RAILWAYS ACT, 1921.

PROCEEDINGS OF THE RAILWAY RATES TRIBUNAL.

THE STANDARD TERMS AND CONDITIONS OF CARRIAGE.

CONDITIONS LETTERED "F."

THURSDAY, FEBRUARY 21ST, 1924.

NINTH DAY.

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PROCEEDINGS OF THE RAILWAY RATES TRIBUNAL.

THURSDAY, FEBRUARY 21ST, 1924.

PRESENT :

W. B. CLODE, ESQ., K.C. (*President*).
W. A. JEPSON, ESQ.
GEO. C. LOCKET, ESQ., J.P.

NINTH DAY.

MR. BRUCE THOMAS and MR. A. TYLOR appeared for the Railway Companies' Association.
MR. JACQUES ABADY appeared for the Mining Association (instructed by Sir Thomas Ratcliffe-Ellis), and for the Standing Joint Committee (instructed by Mr. Edwin A. Hart).

Mr. Bruce Thomas: I appear, Sir, with my learned friend Mr. Tyler to present these conditions which are proposed by the railway companies for the carriage of coal, coke and patent fuel. The Conditions which were originally proposed by the railway companies and deposited are printed in the small Blue Book. Since they were published meetings have taken place between the railway companies and the Traders' Co-ordinating Committee and other persons interested in the carriage of coal, mainly the Mining Association, and, as a result of those meetings and negotiations, a very large number of the conditions have been agreed. This document, the large Blue Book lettered "F," has been prepared and shows the Conditions which have been agreed, those which have not been agreed, and shows exactly what the points of difference are. You will find that the only Conditions upon which an agreement has not been reached are Nos. 2, 3, 4, 6, 7, 9, 12 and 13. In each of those Conditions you will find in ordinary type the proposals of the railway companies, and you will find in italics the proposals which are put forward either by the Mining Association or by the Association of Private Owners of Railway Rolling Stock. They are interested in one of the Conditions, No. 12.

President: Do you think you will reach No. 12 to-day?

Mr. Bruce Thomas: I think it is very doubtful.

President: Mr. Holman Gregory, as you know, is occupied elsewhere and I should like to give him a guarantee, as he is engaged on public business, that we shall not call upon him to-day; I think we can safely do that.

Mr. Bruce Thomas: I think so. We could take some of the other subsequent Conditions if necessary.

President: Very well; we will do that.

Mr. Bruce Thomas: Then the Court will remember that we have already settled the standard conditions for the carriage of merchandise—that has been known as Note A—the standard conditions for the carriage of general merchandise at owner's risk and goods not properly protected by packing, live stock, and live stock at owner's risk. They have been known as Notes A., B., C., D. and E., and to a large extent these Conditions are based upon the standard note that was settled for general merchandise. Certain additions of course have been necessary, but that has been the model that we have tried to follow. I do not know whether it would be convenient to adopt the course that you have adopted on previous occasions of my opening on behalf of the railway companies each contested Condition and taking your decision upon each contested Condition before proceeding to the next one?

President: Are there any general observations that you would like to address to the Tribunal in which you lay down any general principles upon which a note such as this should be framed, or where it differs from the note of general merchandise? I do not say that that is necessary, but if you are going to make any observations before you deal with the particular Conditions you might make them now, because it will be of service to the Tribunal.

Mr. Bruce Thomas: I shall at some time have to go through quite shortly the whole of the Conditions just to draw the Court's attention to what they are, because after all, although we propose the Conditions, it is for the Court to take the responsibility of settling them. Whether I do that now, or when we have got all contested matters out of the way, is a matter that is quite immaterial to me.

President: Follow the course that you think best and will give the best information to the Tribunal.

Mr. Locket: Is not it the fact that hitherto there have been no Conditions attached to the consignment note for coal and coke?

Mr. Bruce Thomas: Well, Sir, yes and no. I think since 1918 Conditions have been attached to the carriage of coal. Prior to 1918 Conditions have not been attached generally, though they have been in the case of some companies. When I say "Conditions" I do not mean always conditions on the back of a document that has been signed by the sender of the coal but a Condition that is brought home by notice to the sender of the coal.

Mr. Locket: In that respect this traffic stands on rather a different footing from the other traffics we have been considering under the other Notes.

Mr. Bruce Thomas: Yes, I think there is a difference.

Mr. Locket: It is probably only a technical distinction, but there is a distinction.

Mr. Bruce Thomas: There is a distinction, and I think we shall find that on the first contested Condition that we come to, but the whole of the information that is available with regard to the terms upon which coal has been carried in the past will have to be discussed, and I think it would be more convenient if we go straight to that point.

Mr. Locket: That is what I had in my mind.

21 *February*, 1924.] [*Continued.*

Condition 1.

Mr. Bruce Thomas: I will just mention Condition 1 which is agreed. This substantially follows Condition 1 in Note A and sets out what information the consignment note or declaration is to give. I do not think there is anything new upon that Condition.

Condition 2.

The second Condition relates to labelling of trucks, and this is one that you will see was not agreed, but fortunately Mr. Abady and I have had an opportunity of discussing this Conditiou and I am glad to say that we have arrived at an agreement, subject to the approval of the Court, which satisfies all parties.

Perhaps I might mention what the proposed amendment is which is acceptable to both of us and then we can go straight to No. 3 upon which the first contest arises. You will observe when we go right through the Conditions that all the railway companies' proposals have been agreed so far as the Traders' Co-ordinating Committee are concerned, but the Mining Association do not accept all the railway companies' proposals, and, of course, we recognise that they are a very important body whose objections have to be carefully considered when we are dealing with the carriage of coal.

Condition No. 2 deals with the labelling of trucks, and, as proposed by the railway companies, it is in this form: "Every truck of fuel shall (except as otherwise agreed, in writing generally, or in respect of a particular consignment) be labelled by the Trader with two labels which shall be securely affixed one on each side of the truck and upon each such label shall be stated: (*a*) the name of the sender and the name of the colliery or point at which the fuel is tendered for conveyance." The Mining Association raised an objection on (*a*), and their objection was to giving always on the label the point of origin, the name of the colliery. There was some objection to that in the case, I think, principally of coal that is consigned to factors. It was thought undesirable that there should be disclosed either to the factor's customers or to the factor's competitors the point or the place from which he got his coal. We appreciated that objection, and the Mining Association appreciated the difficulties that it involved the railway company in, in many cases, if they did not know the point at which the coal emanated; so the Mining Association made the suggestion to get over the difficulty, that (*a*) should read as follows: "The name of the sender and either the name of the colliery or such other information as will indicate to the company the point at which the fuel is tendered for conveyance." We are quite content with that as long as we are given on the label some information which will tell us the actual point at which the coal is handed to us for conveyance. I imagine that where a particular trader does not want to mention on the label the particular colliery from which the coal comes he will have to arrange with the railway company for some sort of code word, or something of that nature. I have no doubt it will all be arranged without any difficulty if any particular trader does not want the colliery from which he is getting the coal mentioned on the label.

Mr. Jepson: Of course, those would particularly refer to coal loaded in the trucks of consignees. The consignees have sent their own trucks down to the particular colliery to be loaded.

Mr. Bruce Thomas: Yes.

Mr. Jepson: And, of course, they do not want everybody to know where the coal comes from.

Mr. Bruce Thomas: Yes; I believe that was the objection.

Mr. Jepson: It would not refer so much to trucks belonging to the collieries, for instance.

Mr. Bruce Thomas: No; I imagine that would be painted so large on the truck itself that all the world would be able to see where it comes from.

Then with regard to (*b*), "The name of the consignee," there is no question upon that.

Then (*c*) is: "The station or place of destination and where such station or place is served by more than one company, the name of the delivering company, and in the case of through traffic, where practicable, the route by which the fuel is to be conveyed." That is agreed. It is the same as the relative condition that appears in Note A., subject to the addition of those words, "and in the case of through traffic, where practicable, the route by which the fuel is to be conveyed." Upon that I am instructed to state on behalf of the railway companies that it is not their present intention to interfere with the practice in regard to stating on the consignment note the route by which the fuel is to be conveyed.

Mr. Jepson: What does that quite mean? Is it that the railway companies do not at the present time insist upon the route, where there is an alternative route, being given upon the consignment note?

Mr. Bruce Thomas: I am told that in some cases the route is given because it is found to be necessary, and in other cases the route is not given because it is not thought to be necessary. So far as the railway companies' present intention goes, it is that the existing practice shall not be disturbed, that is to say, that where the route is given to-day it will be given in the future; where it is not given to-day it is not the railway companies' intention to insist upon it being given because this new condition has been made.

Mr. Locket: Where no route is given, I suppose the railway company at the present time take it by whatever route is most convenient to themselves?

Mr. Bruce Thomas: I imagine so.

Mr. Jepson: What I have in my mind is this: it speaks here of there being given on the declaration or consignment note and also on the label, where the place is served by more than one company, the name of the delivering company, and in case of through traffic the route. One has in mind where the place is served by two companies, but it does not necessarily follow that the rates to the one place or the one town are the same by both companies' routes. In such cases as those it seems to me essential that the route should be given, and I should think it always has been given in the past.

Mr. Bruce Thomas: Yes. I am told that it is not given to-day in the case where there is only one route, but where there are alternative routes it is the practice to state by which route the traffic is to go.

Mr. Jepson: "And in the case of through traffic" does not only mean where one place is served by two companies, but it means in the case of all through traffic, whether there are alternative routes for that through traffic or not.

Mr. Bruce Thomas: It only applies in the case of through traffic where the traffic is passing over more than one line, and it is in that case where there are alternative routes that I understand it is the practice to give the route to-day.

Then (*d*) of Condition 2, as proposed by the railway companies, was: "The nature and weight of the fuel when so required by the company." The Mining Association as you will see at the bottom, first of all objected to (*d*) altogether, and asked that paragraph (*d*) might be deleted. Now they are content that the nature of the fuel should be stated on the label in all cases, and that the weight should also be given where reasonably practicable. (*d*), therefore, will read, subject to the approval of the Court, "The nature and where practicable the weight of the fuel," deleting "when so required by the Company." Upon that the Mining Association are going to make a statement of the same nature as the statement that I made with regard to stating the route on the consignment note.

Mr. Locket: I suppose that is intended to provide for the few small collieries that have no weighing applinances, is it not, where the weight has to be ascertained at some point on the route?

Mr. Bruce Thomas: I think it has a good deal to do with shipment coal also. The Mining Association have agreed there to state the circumstances under

which we have agreed to this alteration, and under which the railway companies have agreed to accept the insertion of these words "where reasonably practicable."

Mr. Abady: On Condition 2, on behalf of the Mining Association I desire to confirm the agreement which has been come to and to which Mr. Bruce Thomas has referred, and to say on paragraph (*d*) that the Mining Association agree that the railway companies have agreed to the insertion of the words "where reasonably practicable" at the request of the Mining Association, and on the understanding that there is no intention on their part of altering existing practice without the Companies' consent. The position is that the Mining Association generally agree that it is reasonable that the railway companies should have stated on the truck the weight of the fuel which the truck contains, but that there are occasions, which are not confined merely to small collieries, where there is no facility for weighing, where it really is not practicable to put the weight on, as for instance in shipment traffic, where you are dealing with a raft of wagons and some alteration takes place in the destination, or something of that kind, and it is necessary to after the labels, and the labels get mixed. One knows the weight of the total consignment, but one does not know the weight of each truck. It is apparently a matter of difficulty, and would take time and be troublesome to both parties if the trucks should have to be re-weighed in order to identify each truck with each label and the weight on them. Generally the arrangement is that the existing practice is to be preserved; subject to that the railway companies are entitled, where it is reasonably practicable to have the nature and the weight of the fuel on the label.

Mr. Locket: In such cases as that the weight is ascertained at the port of shipment.

Mr. Abady: The weight is sometimes ascertained at the colliery, but it is not assigned to each truck; it is simply the weight of each consignment.

Mr. Locket: You mean if there is 500 tons going down, you know that 500 tons is concerned, but each truck does not necessarily bear the weight of the proportion of that 500 tons in the particular truck.

Mr. Abady: That is so.

Mr. Jepson: When it gets to the port it is the general practice as between the factor and the buyer of the coal at the port to have the truck weighed at the port?

Mr. Abady: Yes, I think that is so. I think it might be convenient if I told you here that I am appearing for the Mining Association, and on behalf of the Standing Joint Committee, which consists of representatives of the National Conncil of Coal Traders, the Coal Merchants' Federation of Great Britain and the Society of Coal Merchants. The Standing Joint Committee did lodge objections to the original proposals of the railway companies as contained in the small blue book and are here to support the objections of the Mining Association.

Mr. Jepson: What is the Standing Joint Committee?

Mr. Abady: It consists of representatives of the National Conncil of Coal Traders, the Coal Merchants' Federation of Great Britain and the Society of Coal Merchants. The National Conncil in its turn represents several associations of factors and merchants, which cover the whole of England and Wales as follows: the Railborne Coal Factors' and Wholesale Merchants' Association, the North of England Coal Traders' Association, the Birmingham and Midland Counties Coal Merchants' Association, the North Wales (No. 6 Area) Wholesale and Retail Coal Merchants' Association, the South Wales and Monmouthshire Wholesale Coal Factors' Association, and the Coal Merchants' Federation of Great Britain has a membership of some 7,000, mostly retail merchants, and the Society of Coal Merchants has a large membership that comprises both the wholesale and retail trade.

Mr. Jepson: So that you represent practically all the collieries through the Mining Association, and through the National Council or the Standing Committee practically all the retailers and factors of the country?

Mr. Abady: That is so.

Mr. Bruce Thomas: Then if the Court is satisfied with Condition 2 as amended, I will proceed to Condition 3.

Mr. Jepson: What are the actual words in Condition 2? Mr. Abady read them rather differently, I think. You said: "Where practicable," Mr. Abady introdnced the word "reasonably"—"where reasonably practicable."

Mr. Bruce Thomas: I ought to have said "where reasonably practicable"; that is what I have written down—"The nature and where reasonably practicable the weight of the fuel."

Mr. Jepson: There is only one other comment on 2—perhaps it is rather hypercritical, but it is just as well to raise the point now; it is assumed that whatever information is given on the label as regards the ronte will correspond with the information given on the consignment note, so that the same information will be given, otherwise it might lead in confusion. Take throngh rates, for instance: one has known in the past trucks labelled differently from the ronte given on the consignment note. It is assumed that they would be alike, but I did not know whether yon would like to strengthen Condition 2 by putting in "which shall be the same information as given on the consignment note," or some words to that effect. If you do not think it necessary, we may pass it.

Mr. Abady: I think these matters of form are subject to delicate negotiations between the parties, and if I may say so with respect, it would be better to leave it as it is.

Mr. Jepson: Very well; I will not say any more.

Condition 3.

Mr. Bruce Thomas: Condition 3 is a most important one, probably the most important of the whole set that you have to consider. It deals with the liability of the Company for loss or damage or mis-delivery or delay of the coal which has been handed to them to be carried. The proposal of the railway companies is as follows: "The Company shall not be liable for loss, damage, deviation, mis-delivery, delay or detention of or to a consignment or any part thereof nnless occasioned by the neglect or default of the Company or their servants."

No railway company, I believe I am correct in saying, has ever held itself ont to be a common carrier of coal and, as the Court is aware, whether a person or a company is a common carrier or not depends npon whether or not he professes to be a common carrier and holds himself out to be a common carrier carrying with the liability of an insurer. No railway company, so far as I am instructed, has ever professed to be a common carrier, and if anyone to-day were to sue a railway company for loss of coal in transit and allege that they were common carriers and liable as insurers of the coal, the onus wonld be upon the person who alleged that they were common carriers to show that they were in fact common carriers. That would primarily be a question of fact, and anyone who asserted that they were common carriers would have to prove that fact. That, in my submission, conld not be done to-day. No one could assert or conld prove that a railway company was a common carrier, but on the other hand even if some *primâ facie* case could be put up which the railway companies, treating them as a whole, might be called upon to rebut, they conld, I think, conclnsively show that they were not common carriers and that they never held themselves ont to carry coal as insurers, but only upon the terms that they were not to be responsible for any loss that arose, unless that loss arose through their neglect or default, that is to say, through their negligence.

President: If there was no note before 1918, how did they protect themselves against, as it were, the liability of being common carriers?

Mr. Bruce Thomas: They protect themselves in this way: we will assume that there was no note and also assume that there were no conditions brought home by notice. If a railway company was sued for losing coal in transit, the sender would have to show one of two things, either that they were insurers or just ordinary bailees for reward, in which case it would be necessary for the person claiming to show that the loss was due to the neglect of the company. The first point I make is this, that it could not be shown that the railway company was a common carrier of coal and was therefore an insurer. The onus of proving that would be upon the plaintiff or whoever asserted that the railway companies were common carriers. Therefore, being unable to show that, their only right to recover would be as against a bailee for reward, and it would be necessary to prove negligence. That would be in my submission the position, apart from any conditions at all that had been either agreed to by being brought home by notice to the sender or by being contained in some consignment note. That was the position in our submission undoubtedly up to the year 1918.

Mr. Jepson: Before you come to 1918, was it not the practice at any rate prior to 1918 generally for the railway companies to put on their general notices that they were not common carriers of coal?

Mr. Bruce Thomas: That was not the universal practice. Mr. Pike will give the evidence about this, but I may say that some railway companies on their rate quotations used to state, "We are not common carriers of coal"; other companies used to state on their rate quotations, "We are not liable for loss of coal except on proof of neglect," which amounts to the same thing; and I think other companies said nothing about it. So far as those companies who gave that notice are concerned, it would be quite impossible to raise even a *primâ facie* case that they professed to be common carriers, because there would be direct evidence to the contrary. Neither would it be possible to suggest that those companies which stated that they would only be liable upon proof of neglect were common carriers, because it is fundamental to a common carrier that he should be an insurer, and that when a person who ordinarily would be a common carrier is found to be making a condition which is entirely inconsistent with his profession, then he ceases to be a common carrier, and a considerable number of the railway companies have always stated one or other of those two facts, either in a notice on their rate quotations or in some other sort of notice. I do not propose to deal with the details of that; I will ask Mr. Pike to speak as to that.

President: Up to 1918, no profession of being a common carrier; after 1918, a certain limitation by notice.

Mr. Bruce Thomas: Prior to 1918 no profession; with regard to some companies a notice to the contrary, or a notice that they would only be liable on proof of negligence amounting to the same thing. That is all prior to 1918; I think it began in 1916. In 1918 the railway companies determined to bring home to all classes of traders the conditions upon which they carried all sorts of merchandise including coal, and they said: "In future we will only carry merchandise"—and for the moment I am including in merchandise coal—"if a consignment note is signed upon which our general conditions of carriage are set forth." Of course, it was not practicable to force everybody to append his signature to a consignment note, so what was then done was that a notice was sent round to practically all traders; I need not go into the detail of it; I will give the actual notice with regard to coal in a moment. The notice that was sent round said: "The railway companies only carry merchandise upon the terms which are set out in the Conditions, a copy of which is sent herewith," and notice was given to all traders that those were the only terms upon which the railway companies would accept traffic for carriage. There is no necessity to obtain a signed contract unless a railway company is seeking to limit its liability for its negligent acts. You will remember that Section 7 of the Act of 1854 says that a railway company shall not limit its liability for its negligent acts except by a contract which is signed by the sender of the goods, or the person consigning the goods, the terms of which must be reasonable, but it has always been open to a railway company, although they may have been common carriers, to say: "Now, in future I will not accept any goods for carriage except upon the condition that I am not to be liable for loss or damage in transit unles you prove that that loss or damage was due to my neglect or default"; and so in 1918, in order to make that position quite clear, everybody received a specific notice to that effect. A question arose as to the effect of that notice in a case of *Smith* v. *The London & North Western Railway* which is reported in 35, Times Law Reports, at page 99.

President: What is the date of that case?

Mr. Bruce Thomas: November 19, 1918, is the actual date of the case. In this case of *Smith* v. *The London & North Western Railway* the Plaintiffs claimed £188 damages caused by a wrongful refusal of the Defendants as common carriers to carry the goods of the Plaintiffs. Alternatively they claimed a sum as damages for breach of the Defendants' statutory duties. I think it will save time if I read some portions of this case.

President: Had not the question, not with relation to coal, but with relation to the notice given and brought home to the consignor, been rather fully dealt with by Mr. Justice Wright in *Shaw* v. *The Great Western Railway*?

Mr. Bruce Thomas: Yes.

President: It did cover somewhat the ground of your explanation as indicating that a notice at common law was still good for the purpose.

Mr. Bruce Thomas: It was still good provided it did not attempt to absolve you from your negligent acts. The only reason why I refer to this is that it is really dealing in terms with the particular notices that were given at this date, and the effect of them.

Mr. Abady: Would it be convenient for you to put in the notice that was sent out to the traders?

Mr. Bruce Thomas: Certainly, I am going to put in the notice.

Mr. Abady: And to what traders?

Mr. Bruce Thomas: I am going to put in the notice sent out to the coal trade.

Mr. Abady: You said to all traders.

Mr. Bruce Thomas: The notice is sent out in this case, and I shall read it. The Statement of Claim in this case alleged that the Defendants were common carriers. This is ordinary merchandise that we are dealing with.

Mr. Locket: This was not coal?

Mr. Bruce Thomas: No. "The Plaintiffs alleged that the Defendants were common carriers from Tattenhall Road, near Chester, to Manchester, and that on March 25, 1918, they tendered to the Defendants as such carriers a consignment of glue for carriage from Tattenhall Road to Manchester for hire and offered to pay reasonable hire therefor; but that the Defendants, though at the time they had the means of carrying the goods, refused to carry them. The Plaintiffs alleged that as the goods had to be held back in store they had deteriorated by evaporation, and loss had been caused to the amount claimed." You will see that was an action against persons alleged to be common carriers for refusal to carry. "By their defence the Defendants put in a general denial. They also contended that the damage alleged was too remote to be recoverable at law; that if they were common carriers, which was denied, they had not been tendered their charges, or any charges for carriage. They said that on February 7, 1918, before the goods were offered for carriage, they gave the Plaintiffs notice that in the case of all goods train traffic consigned by the Plaintiffs over the railway they required the Plaintiffs

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to use the forms of consignment notes supplied by them (the Defendants) or to include in the Plaintiffs' consignment notes a clause recognising the conditions contained in the Defendants' forms. The Defendants contended that their conditions were just and reasonable, but the Plaintiffs refused to accept them. Mr. McCall, in opening the case, said that it raised a question of principle of the greatest importance. Ever since 1857 the Plaintiffs had been in the habit of sending consignments from Tattenhall Road station on a monthly credit account. They had paid the full ordinary rates for carriage, and had used consignment forms of their own. Then on February 7, 1918, the Defendants sent out a letter to traders as follows "—and this is the general letter that was sent out—" 'With reference to your practice of using your own forms of consignment notes when forwarding traffic for conveyance by goods train, the railway company request that firms will use the forms of consignment notes supplied by them . . . but if you prefer to use your own forms of consignment notes they must bear the following clause, namely, "The . . . railway company are requested to receive and forward the undermentioned goods as per particulars on this note.—The terms of the railway company's standard form of consignment notes applicable to the traffic at the rate charged are deemed to be incorporated." As an alternative, a general agreement to the effect that you recognise that the goods consigned on your notes are carried under the terms and conditions shown on the company's notes can be given as follows:—"To the . . . railway company.—We agree that the private form of consignment note in use in our business shall be deemed to incorporate the terms of the railway company's standard form of consignment note applicable to the particular traffic at the rate charged." Should you desire to continue to use your own forms of consignment notes I have to give notice that unless they are indorsed as above, or a general agreement in the terms indicated is completed, the railway companies will only accept consignments for conveyance under the standard conditions as set forth on their consignment notes.' " That is the notice that is given that traffic which you hand to the railway company for carriage will only be accepted under the standard conditions as set forth on their consignment notes and a copy of those Conditions was sent.

Mr. Abady: I wanted, if I could, to see a copy of the notice that was sent; this is not coal.

Mr. Bruce Thomas: No.

Mr. Abady: I have only a copy of the coal and coke notice.

Mr. Bruce Thomas: I do not know whether I have that here, but I can get it in a few minutes; it is the form that is in existence to-day; that is the one that is referred to.

Mr. Jepson: It is the form or forms that we were discussing when we came to a decision on Note A.

Mr. Bruce Thomas: That is so. Anyhow, I can get it in a few minutes. It is the thing that is in use to-day.

Mr. Locket: We have it here. (*Documents handed to Counsel.*)

Mr. Bruce Thomas: I think that sufficiently indicates the position. I will now read, if I may, the short judgment of Mr. Justice Roche. " Mr. Justice Roche said that the Plaintiffs had insisted that they were entitled to have their goods carried unconditionally, and had asserted that the Defendants had throughout been, and were obliged to continue to be, common carriers; and the only substantial question for decision was whether that assertion was correct." Of course, if they were not common carriers then the action of refusing to carry would not lie. " In his judgment, the Plaintiffs had wholly failed to make out their case. Under the Statutes dealing with railways there was no obligation on a railway company to be a common carrier, though it might act as such if it chose." Then he referred to Section 86 of the Railway Clauses Act, 1845, and continued: " The Plaintiffs had failed to show that at any material time the Defendants were common carriers of goods of this class between these points. Agreement could be inferred from conduct as well as from a signed document, and though the Plaintiffs had refused to sign consignment notes they had continued to send their goods over the Defendants' line: and they must have done so in the circumstances on the terms that the Defendants were not common carriers. It was clear from the evidence that the Defendants never agreed with the Plaintiffs' view; but, even if they had been common carriers, it was always open to a common carrier to cease to act as such, and the notice of February, 1918, was sufficient to show that from that date, at all events, the Defendants were no longer going to act as common carriers." Then he refers to *Sutcliffe* v. *Great Western Railway*, and continues: " The Plaintiffs objected to having any conditions whatever in the contract of carriage, but they had no right to take up that position. If traders were to have the right to have their goods carried without conditions it could only be with the consent of Parliament, and it must be left to the Legislature to make such a provision if it thought fit. Whether the actual conditions were or were not reasonable was not a question which it was now necessary to decide. If they were unreasonable the Plaintiffs would not be bound by them. The action failed, and there must be judgment for the Defendants." That records what happened in 1918 with regard to general merchandise. Mr. Justice Roche's decision is not, I think, correct (I think it has subsequently been overruled) in his ultimate conclusion that, the railway company having given that notice, were no longer common carriers, and for this reason: the general merchandise note did not seek to limit the railway company's liability for negligence only. There is no condition in the general merchandise note which is incompatible with the profession of a common carrier. You will remember from your consideration of the note on a previous occasion that there is no condition in it which says, " We will only be liable on proof of negligence." There is nothing at all to limit the liability of the company, and therefore I think Mr. Justice Roche was not correct when he came to the conclusion that the railway company, having given that notice, ceased to be common carriers. The railway company gave a notice, and said: " In future we will only carry upon these terms," but there was nothing in those particular terms which they stated they would only carry upon which was inconsistent with their previous profession as common carriers, and so they remained common carriers, but they were carrying only upon the terms set out in the note.

That question arose in a curious way a year or two after the decision in *Smith's* case, and it arose in this way: certain goods—I think they were felt hats—were loaded at the docks in a covered van, and with those felt hats were loaded a number of carboys, not containing acid, but containing peroxide of hydrogen, which is known to be quite harmless in the strengths at which it is ordinarily conveyed in this country, and there was no danger in putting those carboys in with other goods. Unfortunately something happened, and the carboys burst; they probably burst from internal pressure of some kind—it is not quite certain how they burst—and they damaged the hats. It was not the fault of the railway company that they burst. An action was brought against the railway company for the damage to the hats, and they paid for them, because they took the view: " We are common carriers and there are the hats damaged; it does not matter whether it is our fault or not, we have to pay ": and they settled the action and paid for the hats. Then they brought an action against the forwarding agents who had handed the carboys to them. The action was brought for breach of warranty. They said that every person who hands goods to a common carrier warrants that the goods are not dangerous and that they are fit to be carried in the ordinary way. There was another contention, too, that it did not matter whether we were common carriers or not; we were under a

statutory obligation, namely, under Section 2 of the Act of 1854, to accept and forward goods. The answer of the forwarding agents was this: It may be true that a sender warrants to a common carrier that the goods are not dangerous and fit to be carried in the ordinary way, and it is reasonable to assume such a warranty, because a common carrier is bound to accept, but they said: "You are not common carriers," and referred to *Smith* v. *The London and North Western Railway*. They said: "Since you gave that notice you are no longer a common carrier, and therefore there was no warranty." That action was heard before Mr. Justice Horridge, and I think he took that view. Anyhow, the Great Northern Railway Company, who were suing the transport company, failed to recover on their warranty. Then the Great Northern Railway Company appealed to the Court of Appeal against the decision of Mr. Justice Horridge, and that case is reported in 1922, 2 K.B., at page 742, the *Great Northern Railway Company* v. *L.E.P. Transport and Depository, Limited*. I do not know what the letters "L.E.P." stand for. I remember the Master of the Rolls asked the Counsel who was appearing for the L.E.P. Transport Company what they stood for, but he did not know, and nobody in Court knew. I do not intend to read that case, but this very question arose there as to whether the Great Northern Railway Company, who, in common with other railway companies, had given this notice, had ceased to be common carriers, because they had said: "We will only carry upon these terms," and the Court said they had not ceased to be common carriers because there is nothing in this set of conditions which is inconsistent with the profession of a common carrier. Had they inserted in those conditions a condition to the effect that they would only be liable on proof of negligence, a thing that they would have been entitled to have asserted, that would have been quite a different matter, because that would be inconsistent with the profession of a common carrier. The note was very closely examined, though no one suggested that there was any such condition as that in the note, and it was closely examined also to see whether there was anything else in the note that was inconsistent with the profession of a common carrier. The Court said that there was not, and held that the railway companies had satisfied the Court that they were subject to the extended liability of a common carrier, and so had succeeded both on that point and upon another point that it did not really matter whether or not they were common carriers, because they were under a statutory obligation to accept, and the warranty which arose from the relationship of a common carrier with his customer arose just as much from the relationship between a body that was under a statutory obligation to carry—referring to the Act of 1854—and his customer. So that in point of fact the Great Northern Railway would have succeeded in that case, even if the Court had not come to the conclusion that they were common carriers, because the Court said: "Even if you are not common carriers you are bound to carry these goods if they are tendered to you, because you are under that obligation by the second Section of the Act of 1854."

President: You are not saying that a company that is bound to give facilities under Section 2 becomes a common carrier?

Mr. Bruce Thomas: Oh no; I am not saying that. What I was saying at the moment was that the reason for the warranty which is implied when goods are handed to a common carrier is because he is bound to accept them.

President: Because he cannot refuse.

Mr. Bruce Thomas: He cannot refuse. The Court said that although a person may not be a common carrier, yet when you find that he is under a statutory obligation to accept, the same implication arises; that is all I was saying. It has been definitely laid down in a number of cases that a railway company, because of its obligations under the Act of 1854, does not become a common carrier and in fact they are in the same position as anyone else. They are only common carriers if they elect to be common carriers, and profess to be common carriers.

At the same time in 1918 the coal trade received a notice of the conditions upon which the railway companies accepted the coal for conveyance, and perhaps I might hand in this buff notice that was sent round. (*Document handed in.*) It is headed: "Consignment note for coal, coke, breeze and patent fuel." The notice is: "The undermentioned railway companies hereby give notice that they only carry coal, coke, breeze and patent fuel on the conditions set forth on the back hereof, and that such conditions must be deemed to be incorporated with all consignment notes or forwarding instructions relating to such traffic although not referred to therein." Then a number of companies are set out; they are not quite all the companies in Great Britain, because the Scotch companies are not there, neither is the North-Eastern Company—I think those are the notable exceptions. The notice was sent out on behalf of the companies named in December, 1918.

Mr. Locket: I suppose that was not sent out in consequence of the decision in *Smith* v. *The London and North-Western Railway*? That was tried in November, was it not?

Mr. Bruce Thomas: It was tried in November. I do not imagine that it was sent out in consequence of that decision.

Mr. Locket: It was probably under consideration at the time; it did not inspire this document?

Mr. Bruce Thomas: I should not have thought so, because it is adopting the same procedure with regard to coal.

Mr. Locket: I do not know that it is material, but the dates caught my eye.

Mr. Bruce Thomas: I am instructed that this notice had been in hand for several years before 1918.

Mr. Locket: I should imagine so.

Mr. Jepson: I notice as well as the Scotch railways there are some important omissions with regard to the three South Wales companies, like the Barry, the Taff Vale and the Cardiff and Rhymney.

Mr. Bruce Thomas: Yes. My attention had been drawn to that, and I am afraid I omitted to tell the Court. There are some other exceptions; some of the Welsh companies do not appear. The notice speaks for itself; it sets out on behalf of what railways it is sent. I am only at the moment concerned with the first condition: "The company will not be liable for any loss, damage, or delay in transit unless occasioned by the neglect or default of the company or their servants." That is, in our submission, only setting out what had always been the position so far as coal was concerned before. If there had been any doubt about the position, so far as these companies are concerned, there can be no doubt as from December, 1918. If the Court were to assume (although I suggest that they would not be justified in assuming it; it would be for my friend to prove it) that the railway companies were, prior to 1918, common carriers, they were always entitled to terminate their profession as common carriers, and they did so by this notice, if it was necessary to do it, so that whatever may have been the position prior to 1918, as from 1918 they ceased to be common carriers, because they had given a general notice to the effect that they only carried upon terms which were inconsistent with the profession of a common carrier. A railway company is entitled to say that they will not be liable except on proof of negligence and to claim the protection of such a condition, provided only that they show that it has been brought home to the trader; it is not necessary to have any document in writing, and therefore that clearly is the position to-day. In addition to that consignment notes have been commonly used for the carriage of coal since 1918. I am not suggesting for a moment that their use is by any means universal. I suppose the greater part of the coal is not sent upon a consignment note which has these conditions upon the back, though it is, in my submission, clearly sent subject to those conditions in view of the notice that was given.

I do not know that it is material, but the fact is that a considerable quantity of coal is sent upon a consignment note on the back of which these conditions appear. That, in my submission, being the position to-day, namely, that the companies are only liable now for loss or damage upon neglect or default being proved, and that having been in my submission the position of the companies always with regard to the carriage of coal, the condition which we now propose does not seek to alter the present state of affairs. That is at the moment the particular point that I want, so far as I am able, to satisfy the Court upon. Condition 8, where the company ask that the Court shall make it clear by these conditions that they are not to be "liable for loss, damage, deviation, misdelivery, delay or detention of or to a consignment or any part thereof unless occasioned by the neglect or default of the company or their servants." By asking the Court to insert that condition they are not asking them to alter the existing state of affairs or what, in our submission, has always been their position with respect to the carriage of coal. There are just one or two circumstances of which I should like to remind the Court, and which, in our submission, show why the railway company cannot be a common carrier. When I say "cannot be," I mean cannot be expected to take upon itself the heavy burden which a common carrier takes. There are some five or six considerations that should, we think, be borne in mind.

First of all, coal is chiefly conveyed in private owners' wagons, and the majority of the railway companies, in fact I think all the railway companies except the North Eastern, in England, are under no obligation to provide wagons for its conveyance. You will remember that in all the Rates and Charges Orders there is a provision to that effect, that they are under no obligation to provide trucks for Class A traffic; and coal is in Class A. The second consideration that has to be borne in mind is that coal is loaded and unloaded by the traders, and the companies have no control over these operations. Thirdly, in the majority of cases coal is received from private sidings, and is delivered to private sidings, with the result that the companies have not, in the case of general merchandise, facilities for checking the quantity or condition of the consignment at either end. Even when delivery is effected at stations the companies have no practical means of examining or checking. The Court, I am sure, are very familiar with the conditions under which coal is taken delivery of in the various railway station yards.

The President: My colleagues are fully conversant with that.

Mr. Bruce Thomas: The next consideration which we think has to be borne in mind is that coal is not weighed by the railway companies. It would be wholly impracticable for the railway companies to undertake the service of weighing, and the senders' declared weights are almost universally accepted by the railway companies. The next consideration—the fifth—is that coal is conveyed without protection of any kind. It is conveyed in open wagons and, because it is coal, it is liable to be stolen by persons who will get over the railway fences and help themselves to as much as they are able, in the time at their disposal, to take away.

Mr. Locket: Does not that rather imply negligence?

Mr. Bruce Thomas: Does it, Sir? Of course, if that does imply negligence on the part of the railway company we are not seeking to absolve ourselves from the consequences of it.

Mr. Abady: Yes, you are.

Mr. Bruce Thomas: Am I?

Mr. Locket: I remember when I was sitting as a magistrate we frequently had children and adults brought before us for stealing coal from the trucks standing on the sidings at Willesden. It is true they were generally prosecuted by the railway company; but surely it does imply some negligence that trucks standing there should be liable to pilferage in that way.

Mr. Bruce Thomas: I do not want to embark upon a very wide field of discussion as to what is negligence and what is not.

Mr. Locket: Perhaps I ought not to have interrupted you.

Mr. Bruce Thomas: But if that be negligence, then we are not seeking to absolve ourselves from the consequences of it.

Mr. Locket: Your clients did not take that attitude at any rate before the Police Court.

Mr. Bruce Thomas: It would not arise there, would it, strictly?

Mr. Locket: Perhaps not.

Mr. Bruce Thomas: They would prosecute for the theft of it; because they were in possession of the coal, and entitled to prosecute because they have what I think is called a qualified property in it, which entitles them to prosecute for its theft. But I do not imagine that in those prosecutions any question of liability, negligence, or otherwise would have arisen. There is the sixth consideration, which is more or less peculiar to coal; it frequently remains on hand for very considerable periods for convenience of the trader. I do not want to say anything about who would be liable if, when it is standing for a considerable period, some of it is stolen. But it must be clear, I should have thought, that where you have thousands of tons of coal standing on a huge area covered with sidings, it could not be said to be negligence on the part of the company because they have not kept such a keen watch on that coal standing there, for which they receive no payment at all—for the coal—as to prevent the possibility of anyone getting in and taking some of the coal. When I say they receive no payment for the warehousing, I think that is strictly accurate; they do not receive any payment for warehousing or keeping the coal. All they receive is siding rent; and siding rent is payable because a private trader's truck occupies the railway company's siding. The charge is not based upon the tonnage of the coal; it is based upon the truck; it is so much per truck per day for the provision by the railway company of the actual accommodation upon which the truck stands; and that is all they are paid for. Therefore it is not reasonable to impose upon them the heavy burden of responsibility while coal is standing on these sidings. However, that is perhaps going into the question of the circumstances which amount to negligence.

All I am concerned with at the moment is to try, to the best of my ability, to satisfy the Court that it is not reasonable to put upon a railway company any greater liability than the liability which flows from proof of negligence against them. I make that submission with some confidence, because that has been the position always in this country, so far as we can ascertain, with regard to coal. That it has been the position will be evidenced by Mr. Pike, who will, I think, be able to tell you that claims for loss of coal in transit are most rare; there are very few claims made—and no claims, anyhow, are ever paid—when one considers the tremendous quantity of coal that is carried in this country. Mr. Pike will be able to tell you that in his experience practically no claims have ever been paid. Some may, no doubt, have been paid where it has clearly been the fault of the railway company; but he will tell you this, that no claim has ever been paid except where the loss has been clearly through the negligence or the fault of the railway company.

(The Tribunal conferred.)

The fact that no claims have been paid by the railway companies for loss in transit except in cases where they have been satisfied that they were at fault—were to blame for the loss—is, I submit, very strong evidence that the position has always been recognised by the coal trade. By "the position" I mean either the position that the railway companies were not common carriers, or, which amounts to the same thing, that they only carried upon the terms

that they were not to be responsible for loss which was not due to their negligence. I believe that the fact that that was the position has always been well known in the coal trade. There is no case in which a railway company has been held to be a common carrier of coal; so far as I am aware there is no reported case where an action has been brought against a railway company for loss of coal in transit; at any rate, I have been able to find no such case. There are one or two cases in which the allegation has been made, or it has been contended, that a railway company was a common carrier of coal, and in all those cases it was held that the railway company was not a common carrier of coal. There is the case of *Johnson* v. *The Midland Railway Company*, reported in four Exchequer Reports, at page 367. The headnote, or side-note, is as follows:—"The 86th section of the Railway Clauses Consolidation Act is permissive only, and a Railway Company who under it elects to carry goods, is subject to no greater liability than attaches to carriers at common law. Therefore, such a Company is not bound to carry every description of goods, and between all places on their line, but only such goods, and to and from such places, as they have publicly professed to do, and have convenience for that purpose." The declaration in that case stated "that the defendants were common carriers of goods and chattels for hire from Melton Mowbray, in the county of Leicester, to Oakham, in the county of Rutland; that the plaintiff, on, &c., caused to be tendered to the defendants, at their place of business for the receipt of goods for carriage in Melton Mowbray, to wit, &c., five tons of coals, and requested the defendants to carry the coals from Melton Mowbray to Oakham; yet, although the defendants had ample and sufficient conveniences." &c., "and although the defendants received and carried the goods of other persons on that occasion from Melton Mowbray to Oakham, the defendants, not regarding their duty as common carriers, wholly neglected and refused to receive or carry the said goods." It was argued there that the defendants were bound, as common carriers, to carry the coal.

President: Did they raise it on demurrer, or how?

Mr. Bruce Thomas: No. It came on for trial at the Leicester Assizes; the Plaintiff got a verdict, and they moved for a rule to set aside the verdict.

President: Then they substantially held that if a railway company then took advantage of the permissive powers to act as a carrier they were in the same position as any other carrier, and could limit by notice.

Mr. Bruce Thomas: Yes, could limit by notice; or to put it in another way——

President: ——could not profess.

Mr. Bruce Thomas: Could or could not profess.

President: And in that case they had made no profession.

Mr. Bruce Thomas: That is so. The verdict was set aside, and the rule was made absolute. Baron Parke said: "At common law a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession." Then he states the law as laid down by Chief Justice Holt in *Lane* v. *Cotton*, and he says: "There is nothing which induces me to think that we ought to give a different construction to the 86th section, which in terms only enables, not obliges, the Company to be carriers. Therefore, I think that the circumstance of their having undertaken to be carriers does not bind them to carry from or to each place on the line, or every description of goods." The verdict founded upon the allegation that they were common carriers was set aside. Then the question arose again in the case of *Oxlade* v. *The North Eastern Railway Company*. You will remember, Sir, that before the Railway Commissioners were set up any complaint under Section 2 of the Act of 1854 was decided by the Court of Common Pleas, and complaint could be made by motion.

President: *Oxlade* is the case which is usually quoted in all these, is it not?

Mr. Bruce Thomas: Yes, I think it is, Sir.

Mr. Abady: It is *Oxlade* No. 1; there were two cases.

President: Is that the Law Journal which you have there, Mr. Bruce Thomas?

Mr. Bruce Thomas: Yes, the Law Journal, 1857, volume 26, Common Pleas, page 129. It was a complaint under Section 2 of the Act of 1854, which had then recently been passed, and one of the contentions was that the railway company were common carriers of coal.

President: And they were bound to give the facility.

Mr. Bruce Thomas: Yes. I merely refer to it, because I find this in the Judgment—the judgment of the Court was delivered by Mr. Justice Creswell; I am reading from page 135, the last paragraph but one in the right-hand column, where he says: "When the rule was first before the Court it was considered that Mr. Oxlade had no right to call upon the company to carry all coals and coke that he might offer for that purpose; and since then an opinion has been expressed by the Court of Exchequer in an action between these very parties that the company are not common carriers of coal, thus confirming our view of the claim in question." That case, which is referred to by Mr. Justice Creswell, as having been decided between these same parties in the Court of Exchequer, is not, I believe, reported.

President: No; and I have often wondered why it was not.

Mr. Bruce Thomas: There is a very short case in one of the earlier volumes of the Law Times, and it is referred to in Volume 1 of the Railway and Canal Traffic Cases, but it merely states that an action was brought, and that the plaintiff was nonsuited. However, this is as authoritative as any report, the statement of the Common Pleas that the question had been decided by the Exchequer Court in an action between these same parties, and that the decision was that the company were not common carriers of coal. Moreover, this decision of the Court of Common Pleas is a finding that the North Eastern Company were not common carriers, because the Court says: "Thus confirming our view of the claim in question." I refer to that in particular for the reason that it relates to the North Eastern Railway Company, and we know that the North Eastern Railway Company is a company which supplies trucks for the carriage of coal, lest it might be said that the reasons may be very good why a railway ought not to be a common carrier of coal in a private owner's wagons, but these reasons will not apply to the North Eastern. Upon that, I should like to make this observation. These conditions are to be made applicable to the whole of the railways in this country. All the railways, except the North Eastern, and the Scottish companies to a certain extent—there are a substantial number of private wagons in Scotland——

Mr. Abady: Half and half, roughly.

Mr. Bruce Thomas: Yes; you have half and half in Scotland; practically all company's wagons on the North Eastern; generally speaking, all the rest of the country private owners' wagons, so far as coal is concerned. The conditions have to be settled for the whole of the country; they must, therefore, I submit, be settled on the footing that they are private owners' wagons. There is no suggestion to have separate sets of Conditions in operation. Now, how can a railway company be a common carrier of goods which are handed to them in a truck which is not the railway company's truck, but is, in common carriers' language, the property of his customer? The idea of a common carrier is that he is ready to carry for anyone the particular goods from point to point which he professes to carry, provided he has got room in his cart or in his wagon. When a railway company is asked to take on to its railway a wagon belonging to a private owner, it seems, in our submission, to be wholly inconsistent with the relationship of customer and common carrier. A common carrier is responsible for the safety of the goods,

and he is responsible for the sufficiency of the wagons. The person who is responsible for the sufficiency of the coal wagon is not the railway company at all; it is the owner of the wagon; he has the entire responsibility with regard to the fitness of the wagon. The railway companies specify the sort of wagon only which they will take on their lines, but it is the duty of the sender to see that that is a proper and fit wagon so far as he and the railway company are concerned—the railway company may have certain other duties which are primarily connected with the safe working of the railway; but that is the duty of the owner of the wagon. I submit that that in itself is sufficient to show that you cannot make a railway company a common carrier of coal conveyed as coal is conveyed in this country. What the Mining Association propose in substance is to make the railway companies common carriers, or insurers, of coal. They never have been, in my submission, prior to 1918. It is clear beyond all doubt that since 1918 they have not been; and if the Mining Association now suggest that they are to have these quite different obligations put upon them from those which the railway companies have been under in the past, then I submit it is for them to justify their proposals.

Mr. Abady: Might I add that you should have said, "What the Mining Association and the Co-ordinating Committee propose"; because you rather gave the Court, I think quite erroneously, though without any intent, a wrong impression. The Co-ordinating Committee support the Mining Association, and are themselves, I understand, urging the objection.

Mr. Bruce Thomas: Very well; only the print does not say that.

Mr. Abady: I do not know who is responsible for the print.

Mr. Bruce Thomas: The print says, "The Mining Association will propose the substitution of the following."

Mr. Abady: I just wanted to make that clear, in view of what you said.

Mr. Bruce Thomas: It is proposed, then, I will say, in substance to make the railway companies insurers; and the position being what in my submission it is, then I suggest it is for them to substantiate the proposal which they are putting forward.

I should like to make one other observation. Mr. Pike will tell you that no claims have been paid for coal lost in transit in the past unless the railway companies have been satisfied that they have been at fault; and it is in that state of affairs that coal rates have been developed in the past. If you are going to make a fundamental alteration in the liability of a railway company in connection with the carriage of coal—because, after all, the important thing in these matters is where the onus lies; whether I have to show that I have not been negligent or the sender of the coal has to prove that I am negligent: because, unfortunately, coal is invariably lost in circumstances that are probably not known to anyone, except, in the case of coal stolen, to the thief. Therefore the question of onus is the vital thing. The onus being where it has been in the past, namely, upon the trader, and the railway company never having paid any claims unless they were satisfied that they had been at fault, railway rates have been built up and developed in that state of affairs. If this fundamental alteration is going to be made, no one knows what the financial effect will be, and it is quite impossible to guess at it. Nothing but experience over a number of years will afford any evidence as to what effect it will have. Therefore we think that from the financial aspect any alteration might have a very important bearing upon rates, I do not say now, but in the future, when such experience has been obtained as will enable a conclusion to be come to as to what the result had been of altering the burden of proof.

I propose to call Mr. Pike, who will be able to give you a good deal of information which I think you will find useful in coming to a conclusion on this point; and who, in addition, will be able to give you from the practical point of view very cogent reasons as to the difficulties in which the railway companies would be if they were placed in the position of always having to pay for a shortage of coal unless they could themselves account for that shortage. After all, I think that is what it comes down to ultimately from the practical point of view. Unless the Court takes the view that it is more for the Objectors to substantiate their objection in the circumstances that I have put forward, than it is for me to promote the proposal that we have to put forward—unless the Court takes that view, then I will now call Mr. Pike.

President: I think it will probably be better to call Mr. Pike.

Mr. Abady: Before that course is taken, might I ask Mr. Bruce Thomas to make clear one point, as I think it would be convenient? I think it would be convenient to know whether Mr. Bruce Thomas is saying that if the burden of proof that there was no negligence is put upon the railway company, that makes the railway companies insurers.

Mr. Bruce Thomas: I did not say that.

Mr. Abady: The two things seemed to me to be different.

Mr. Bruce Thomas: What I said was that the proposal put forward was in substance one which made the companies insurers. I was very careful to say "in substance," because I agree in form it does not.

President: You mean fail to prove, in the proviso?

Mr. Bruce Thomas: Yes; they have taken their proposal out of Note "A." I think the general body of traders would be very astonished if they thought that railway companies, which have always in the past been insurers of goods, are no longer insurers of goods. Technically, as a matter of form, they are not insurers of goods; because you find in Condition 3 this exception, in case of casualty, subject to the railway company proving that they have taken all reasonable foresight and care. It is true, therefore, that exception having been inserted, technically speaking the railway companies are not insurers. But I still say that in substance they are insurers, and, inasmuch as the Objectors in this case propose to bring that Condition into the Coal Note, they are in substance asking the Court to put upon the railway companies the liability of insurers.

Mr. JOHN PIKE, Sworn.

Examined by Mr. TYLOR.

1314. It is not necessary to introduce you to this Court, Mr. Pike; but, for the purposes of the shorthand-note, you are Assistant to the General Manager of the London Midland and Scottish Railway Company?—That is right.

1315. With regard to Condition 3, which Mr. Bruce Thomas has been discussing, until recent years, I think, it has not been the practice with any of the principal railway companies to obtain a consignment note with conditions of carriage in respect of coal traffic?—That is so.

1316. The practice, I think, was for the sending colliery to hand to the railway company a form of declaration in respect of the traffic forwarded, and such declaration would give the name of the colliery, the name of the forwarding owners, the numbers of the trucks, description of the fuel, the weight contained in the trucks, the name of the consignee, the place of destination, the rate, and who pays the charges?—Yes. In some cases the form was provided by the railway company.

1317. In 1916 did the railway companies come to the conclusion that it was desirable to put matters on a more satisfactory basis?—Yes.

1318. I think in December, 1918, the Railway Clearing House issued a notice to all senders of coal

and coke in the terms of the document put in by Mr. Bruce Thomas?—Yes.

1319. That is document "J.P.2"?—Yes.

1320. Do you desire to refer to the first condition on that notice, that the company will not be liable for any loss, damage or delay in transit, unless occasioned by the neglect or default of the company or their servants?—Yes. That is very similar to, if not identical with, Condition 3 of Note "A."

1321. Was that Condition, which I have just read, any change in the position that the companies had been adopting up to that date?—No; it was the position that they adopted, and in some cases it was even then to be found on quotation forms, or otherwise.

1322. It practically expressed the position that had been taken up prior to 1918?—Yes, certainly.

1323. With regard to the attitude of the railway companies to the carriage of coal, is it the fact that the company have never held themselves out to be common carriers of coal?—No, they have not.

1324. I think some companies have gone further than that, and have given public notice that they were not common carriers of coal?—Yes, quite a number. I can produce several specimens.

1325. Perhaps you might give those specimens?—The Great Western and the North Eastern, for instance. This is a Great Western notice—(*same produced*)—and it reads: "The company further give notice hereby that they are not common carriers of the following articles, or articles of a like nature, and that they will only carry them at owner's risk by special agreement and under special conditions." That includes coal, coke, sand, stairary, shoddy, and manures.

1326. *Mr. Locket*: I see that the bill is headed "The Explosives Act."—That part is Explosives Act—(*indicating*). *This* part is dangerous goods; and then the notice with regard to their not being common carriers of certain articles comes at the bottom.

1327. Do you think that it is a reasonable notice, to put at the bottom of a document headed "The Explosives Act" a clause drawing attention to the fact that you are not common carriers of coal?—It does seem to be a peculiar place in which to put it.

1328. I should question anyone seeing it. Unless they were interested in explosives they would not read it?—That may be so; but the "coal" and "coke" is in fairly big type. The North Eastern notice says: "By-laws and Regulations," and then, "General Notices and Conditions." That says, "The company give notice that they are not and will not be common carriers of explosives, benzolene, dangerous oils," and so forth, and then goes on to say "coal and coke."

1329. That is a more general notice?—Yes, a more general notice. But it is there again put in with explosives.

1330. Yes; but that deals with all sorts of other things?—Yes, it includes musical instruments, furniture, toys, china, glass, pottery, and so on.

1331. *Mr. Tylor*: I think in the case of the London and North Eastern Railway in the account forms you have the notice "The London and North Eastern Railway Company hereby give notice that they are not common carriers of the following articles or articles of a like nature, and that they will only carry them at owners' risk by special arrangement and under special conditions"; and under those appear the names "coal and coke"?—Yes. That is a special form of account for coal and coke, and that notice appears at the head of it.

1332. I suppose that notice would have gone to the individuals concerned, would it?—Certainly. It is printed at the head of the account forms, so that they get it every month.

Mr. Jepson: That is quite new, if you say the London and North Eastern.

Mr. Tylor: Yes, it is the London and North Eastern.

Mr. Jepson: That has been in operation for only twelve months?

Witness: No, it goes back further than that; because I have a Great Central notice here which is in exactly the same terms.

Mr. Jepson: To remove a point that was in my mind, that it was not something introduced by the London and North Eastern as an effect of the amalgamation; it was, at any rate, already in existence in one of the amalgamated companies?

1333. *Mr. Tylor*: Yes; it was continued after the amalgamation. (*To the witness*): Was it the practice of the companies to accept from senders before 1918 their own form of consignment notes?—Yes.

1334. Generally those consignment notes showed no conditions, or made reference to no conditions of carriage?—That is so.

1335. Your notice of December, 1918, to which you have already referred, stated that the conditions on that notice should be deemed to be incorporated with all consignment notes or forwarding instructions, although not referred to therein?—Yes, and that referred also to consignment notes printed by the companies, which had no conditions on the back. Forms of declaration would, perhaps, be a better way of describing them.

1336. *Mr. Jepson*: I see the copy of the North Western consignment note—or declaration, as it is called—which has been given to us for the purpose of consideration of all these notes, does not bear any conditions on the back. It is simply a declaration as to coal, coke, breeze, and patent fuel?—Yes; those are some old forms which are being used up.

1337. "Subject to their rates and regulations in force for the time being"?—Yes; and that, of course, refers now to these regulations dated December, 1918.

1338. *Mr. Tylor*: Have you put in the Midland one?—No, I have not that here; but the conditions are printed on the back of the Midland consignment notes.

1339. This is the present London, Midland and Scottish form?—Yes. The form which was handed in before was an old form, old stock which is being used up. But this is the form which is now being adopted.

1340. Apart from an incorporation by that notice, did most of the companies include in their rate quotation forms a notice to the effect that they would only recognise any claim for loss or delay attributable to proved negligence on their part?—Yes, a good many of them did so. I have quite a number of them here. I think almost every company makes some reference to it.

1341. Did that practice exist before 1918?—Oh, yes. I have one London and North Western here, dated 1904, and that says the company will only recognise any claim for loss in transit which is attributable to negligence on their part.

1342. I want you now to deal with those special considerations, to which Mr. Bruce Thomas referred in his opening speech, which differentiate the treatment of coal from general merchandise. In the first place, do wagons containing fuel have to be taken from the sending points to the railway company during the hours of darkness?—Yes, as well as the hours of light.

1343. But largely during the hours of darkness?—Yes.

1344. And in circumstances in which it is not practicable, or when it is very difficult, for the company's servants to make any form of check?—Quite so; and, of course, the men who take the coal out of the colliery siding never see the consignment note, and the men who deal with the consignment note never see the coal.

1345. The traffic itself is always loaded and unloaded by the traders themselves?—Yes.

1346. I suppose in many, if not in all, cases the company have no control over the operation of loading or unloading?—No, none at all.

1347. I understand there are many cases, or more frequently than not, where the coal has been despatched before the consignment note is made out?—Before we receive the consignment note?

1348. Yes.—The coal has gone away before we get the consignment note in most cases.

1349. With regard to the use of private owners' wagons. Mr. Bruce Thomas made a statement on that subject, and perhaps you will just deal with it in evidence. Except in the case of the London and North Eastern and about half of the Scottish railways, coal is conveyed in private owners' wagons, is it not?—Not the whole of the London and North Eastern Railway; only the North Eastern section of the London and North Eastern Railway. Apart from that the greater bulk of the coal in England and Wales is carried in owners' wagons, and in Scotland rather less than half is carried in private owners' wagons.

1350. Of course, the upkeep of private owners' wagons is not a responsibility of the railway companies?—No. But naturally we stop them if we see anything amiss.

1351. Do many of these wagons have bottom or end doors in addition to the side doors?—Yes, quite a number. cc

1352. I suppose, if these are not well secured at the loading point, or if the fastening is worn or defective, a loss of coal can easily occur during transit?—Yes.

1353. Is it in your view practicable for the company's staff to examine every truck at the time the traffic is accepted by the company?—No; usually there will only be the driver and fireman and brakesman there, and they cannot be expected to examine trucks.

1354. I suppose *a fortiori* it would be more difficult, or impossible, to conduct such an examination during transit?—We have examiners at certain places who make a general examination to ascertain, so far as they can, by such examination as they can make in the time, that the wagons are fit to travel. But beyond that it is quite impossible to make any detailed examination of the wagon; and, of course, it would be quite impossible for them, for instance, to detect any defect in the flooring of the wagon, or the bottom door not being properly secured, which is not a thing that would reveal itself in the ordinary examination.

1355. I think you have in your possession, and you can produce, some instances of loss from wagons from such causes as you have been describing—defective fastening of doors, and so on?—Yes, I have instances of that sort.

1356. Do discrepancies in weight arise between loading and unloading owing to differences in the method of weighing?—Frequently.

1357. Can you describe quite shortly to the Court how those discrepancies arise?—Yes. I will take first of all the case of coal that is going to a station. It is weighed at the colliery over a truck-weighing machine—in the truckload, of course—and the weight of the contents is got at by deducting the tare. The tare is painted on the wagon. Of course, the tare varies from time to time; and in a good many cases the colliery people, instead of re-painting the tare, simply keep a list in the weighbridge office of the latest tare weighings, and they work from that list; so that the tare upon which they have calculated is different from the tare that is painted on the wagon. But anyhow, it is weighed in wagon-loads at that end; and when it gets to the other end it is either weighed in cartloads over cart-weighing machines as it goes out, or, in a good many cases, it is weighed by small —I think they call them "bob-ups," which weigh about a hundredweight at a time; and, of course, when you have those divided weighings they do not always reconcile themselves with the weights obtained at the colliery over the truck-weighing machines.

1358. Of course, even if the same method of weighing, or the same machines were used, there is a discrepancy between one machine and another?—Oh, yes; and in the method of weighing. Some collieries have automatic weighing machines, and the coal is weighed while it is still moving; and, if you weigh that way and then weigh the same truck standing, you frequently get slightly different results.

1359. Perhaps you would amplify that, and explain why you get the difference between the moving truck and the stationary?—It depends upon the speed at which it is travelling, for one thing. Of course, it should go over very slowly. It depends on whether the couplings on either side of the truck are loose or tight; and it also depends to some extent on whether the headstocks of the wagon are in line; if one is higher than another it makes a difference. Of course, when it is for private sidings, sometimes there it is weighed in truckloads at the receiving end, and then they do not often weigh the empties, and they have to work on the tare painted on the wagon, which may not be, and frequently is not, the tare upon which the colliery has been working; and therefore they get a difference again. But on the whole, if one takes the average, there is not very much loss.

1360. But all these matters are matters in respect of which, if the traders have their way, the company is to take responsibility. The traders' desire is, I understand, that the companies shall be under responsibility for all loss of this nature during transit, which may occur from any of these reasons?—They seem to seek to put upon us the onus of proving what has happened.

1361. When the wagon doors are taken down, I suppose it is inevitable that a certain amount of coal falls to the ground?—Yes; some coal always does fall to the ground, and is not always all picked up.

1362. Butts, and so on, are thrown out when coal is unloaded?—Yes.

1363. Is the weight of those things always taken into account?—I do not think so, because they work on the weight of the coal that is carted out.

1364. Does it sometimes happen that two trucks of coal may be unloaded at the same time into the same vehicle?—Yes. It is not at all an infrequent occurrence for a man to take part of his coal from one truck and part from another.

1365. In such a case I suppose it would be very difficult to check it?—Yes, it is very difficult to check unless you take an average; and if you take an average I do not think anyone would ever have any loss.

1366. As is pointed out, if the unloading is done by the consignee's carter, it is difficult to check the weight where the coal is taken from two trucks?—Yes, where there is more than one truck.

1367. Is it uncommon for coal to be unloaded in small quantities from one truck by hawkers?—It is sometimes sold to hawkers, and they sometimes take their own coal out of the truck and weigh it.

1368. When carts are tared coming into the depôt, are they sometimes tared with weighing machines and other utensils of the merchant inside?—Yes; they may come in with little trolleys, and so on, on them.

1369. I suppose when they come out with the coal those things are not taken into account. You said, I think, that the companies had never held themselves out to be common carriers of coal. Is it a fact that no claim for a loss of coal in transit has ever been paid, so far as you know, to any trader except on the ground that you were satisfied that there had been negligence?—The number of claims we get for loss of coal is, first of all, extremely small when taken in regard to the volume of traffic that is passing—almost infinitesimal.

1370. *President*: Is it one a year, or two, or how many?—I am afraid I cannot give you any figures, Sir; but, when you think of the fact that we carry over 200,000,000 tons of coal per year, the number of claims is very small.

1371. But unless you tell me what they are I cannot judge; can I?—I should not think that on the North Western we used to have more than, perhaps, three in two months.

1372. Large amounts or small amounts?—Small amounts usually.

1373. *Mr. Locket*: May that not be due to the fact that under the existing conditions traders realise it is hopeless to put forward claims?—It might; and

they have accepted the conditions. But when we have made tests we have found that, taking a period, there is very little variation. If anything, the weight that we carry is rather more than the weight that is declared to us—very slightly in that direction. When we have claims for loss and we have taken that particular trader's traffic over a period, we have found that some have weighed a little less and some have weighed a little more; but, on the whole, he has not lost very much, if anything. I have some information here of a test which the North Eastern made. They tested 160 wagons in one month, in September, 1922, and weighed over the company's machines. The weight arrived at exceeded the sender's declared weight by 14 tons 11 cwt.; or an average of nearly 2 cwt. per truck over-weight.

1374. *Mr. Jepson*: Is it part of the instructions to the officials on the railways to make occasional tests of coal and other traffic which is declared without the railway companies being able to test the weight at the sending point?—Yes, occasional test weighings are made of coal and other traffics of a similar nature —sand, and so forth; and then we find some wagons under the declared weight, some wagons over the declared weight—sometimes very much over the declared weight.

1375. Do you often get requests now from traders who think that they are being under-supplied by the collieries—that is, they are not getting the weight from the collieries for which they are paying. Do you ever get requests to weigh over a period a few of the wagons?—Yes, Sir, we sometimes get requests of that sort. I have no particulars of any such weighings here, though.

1376. Can you give the Tribunal, so that they may measure up the amount that the companies do pay in respect of loss of coal, how much has been paid by, say, the London and North Western in twelve months?—I am afraid I cannot give you a figure, but I know it is quite low. What frequently happens is this, that if we are satisfied that the coal has really turned out so much short, and there is no explanation as to how that loss could have occurred in transit, we assume that is all there was in the truck and we charge the carriage on the lower weight. In other cases where we have picked up coal on the line and we think—or something else causes us to think—that there has been some negligence somewhere on the part of our staff, we have settled claims for half, or something like half. But the total amount so paid cannot be very much.

1377. A few pounds a year; £5 or £10 a year?—I should think it came to more than that.

1378. *President*: £100. £200, £300, what is it, about?—I am afraid I should be guessing if I gave you any figure at all.

Mr. Tyler: I think you have some instances of claims for short weight, and perhaps you might give the first one of the instances in your proof, Aisgill, Goodman.

Mr. Bruce Thomas: At the top of page 13 there is a rather interesting one.

Witness: Yes. This is a man who complained in December, 1923, of two wagons of coal from Coppice to Ludlow, and two wagons to Wolferton; he complained that they had been pilfered in transit. On inquiry it turned out that the wagons to Ludlow were the correct weight, and that the two wagons to Wolferton we had 7 cwts. in excess of the colliery declared weight.

1379. *Mr. Bruce Thomas*: He did not lose much there?—No, he did not lose anything.

Cross-examined by MR. ABADY.

Mr. Abady: What inference is the tribunal to draw from the instance of Aisgill, Goodman, to which you have just referred?

Mr. Bruce Thomas: I think that is a question which should be addressed to me.

1380. *Mr. Abady*: I want to know what that evidence is intended to convey. Is it typical or not?—No, it is one that was referred to out of—I do not know how many I have got here—50 or 60, I suppose. It is typical of this, that very frequently we get claims in which I should think more often than otherwise there is absolutely no substance at all.

1381. Would it be true to say that that remark may be applied to claims in respect of general merchandise?—Yes.

1382. You said that until recent years it had not been the practice to get consignment notes with respect to coal?—No; that it had not been the practice to get consignment notes with conditions printed upon them.

1383. When I refer to a consignment note, I mean a consignment note with conditions. The declaration notes without conditions were in some case provided by the companies?—Yes.

1384. I think it would be true to say, would it not, that some of those declaration notes made no reference at all to any rates and conditions?—That is so.

1385. And some of them only made reference to rates and regulations?—Yes.

1386. Some of them, on the other hand, made reference to rates and conditions?—Yes.

1387. In addition, a great number of collieries used their own delivery notes, that is to say, notes without declarations?—Yes.

1388. Some of those contained no reference to conditions, and some of them did?—Quite so.

1389. But as a rule they contained no reference to the conditions?—As a rule, the colliery notes did not.

1390. I do not know whether it would help the tribunal if I put this to you: There is a Midland Railway note which says: "Subject to the rates and conditions in force for the time being"; and a Great Central Railway note which says "Declaration of coal, coke, breeze, and patent fuel. Subject to the rates and regulations in force for the time being." Is that right? There is no reference to conditions there, is there?

Mr. Bruce Thomas: These are fairly old documents.

Mr. Abady: We will come to the appropriate date in a moment, if you do not mind.

Mr. Locket: They are practically the same as the London and North Western Railway, the one we have before us, "Subject to the rates and regulations in force for the time being."

Mr. Abady: There is no reference to conditions there, is there?

Witness: I have here some that do say "Subject to present and future public notices and conditions of carriage."

1391. I do not think there is any conflict in fact; but you did say in or about 1918 it was desired by the railway companies to put the matter of the consignment of coal on a more satisfactory basis?—I think I said 1916.

1392. Are you telling the Court that, under the old declaration notes, the railway companies were not responsible as common carriers?—Of course, it is a legal question on which I ought not to express an opinion; but we never regarded ourselves as common carriers of coal.

1393. Was there any doubt about it?—I do not know really.

1394. What I want to know is, what was it that it was desired to put on a more satisfactory basis. If, as it was put by Mr. Bruce Thomas, you never have been common carriers of coal, what was it that it was necessary to put on a more satisfactory basis?—It was that it would be a very desirable thing to have conditions for the carriage of coal just as we had conditions for the carriage of other descriptions of merchandise. We were overhauling them all about that time, and we had been overhauling the others earlier than that.

Mr. Jepson: When you asked the question "Was there any doubt about it," did you mean in the minds of the railway companies or in the minds of traders?

Mr. Abady: In the minds of the railway companies. I think it was quite clear in reference to the context; because I was saying what the railway com-

panies desired to put on a more satisfactory basis. Did it arise, or was there any doubt in their minds as to the position under the old declarations?

Witness: I do not think so.

1395. You have always taken that view?—Yes.

1396. *Mr. Locket*: Was there no special reason to draw your attention to this at that time. It seems rather strange you should have devoted your time to it in a time of war when you were so busy with other things?—We had started just before the war revising all terms and conditions of carriage of general merchandise, and so on; and we gradually, as we got some time, went on, and, amongst others, coal was considered.

1397. *Mr. Abady*: Would it be true to say that the matter eventually took the form of the issue by the Railway Clearing House in or about 1918 of the document to which Mr. Bruce Thomas has referred?—Yes, dated December, 1918.

1398. Which document, he pointed out, did not include the Scottish companies or the Welsh coal-carrying lines. That is the document?—But they considered they were protected otherwise.

1399. I was only tryiug to identify the document; I am making no point on that at all. Would it be true to say that, on the issue of that note, objection was taken by the Mining Association, and by colliery companies generally, to consign coal subject to those conditions?—Yes; a general objection was taken.

1400. And uegotiations took place of a friendly character—as I hope they always are between the mining people and the railway company—with the Railway Clearing House?—Yes.

1401. Those negotiations were continued, I think, until the passing of the Railways Act, and the imminence of settling by the Tribunal of other conditions made further negotiations unnecessary?—You are probably right; but I was not with the railway company then.

1402. What I am putting to you is, there is no doubt about it that the railway companies did issue this notice and say that they would not carry coal except under these conditions. But I want to have it clearly before the Court that there is equally no doubt, subject to isolated instances of exception, that the whole of the coal industry on their part said that they objected to consign coal subject to these conditions, and they would not do so?—But the fact remains that a large number of them to-day consign coal under those conditions.

1403. I admit there are some; but in regard to the bulk of coal the old practice of the old declaration notes is carried on now, is it not? What is the legal inference to be drawn from that is a matter which I shall have to submit to the Tribunal; but I want to agree on the facts. Substantially this note has made no difference to the practice which has been followed by the mining industry; whether they are bound by it or not, as you have issued it, is another thing?—Apart from whether they are bound by it or not, a considerable number of collieries are using to-day consignment notes containing those conditions of carriage.

1404. Yes, there are some; but I am talking about the bulk?—I am saying a very large number. In Scotland practically the whole of the coal is consigned on Company's consignment notes; on the Midland, 90 per cent. is consigned by company's consignment notes; on the old London and North Western 72 per cent. is consigned by company's consignment notes.

1405. Is that tonnage?—72 per cent. of the forms used.

1406. We will leave it at that. You are right and I am right. It is simply a question of degree, whether it is more the one way or the other. Now with respect to this notice. I observe that the Great Western—that is the other thing you rely upon as being notice to the public; it is headed: "The Explosives Act, 1875,"—

Mr. Bruce Thomas: No; it is headed "The Great Western Railway."

1407. *Mr. Abady*: I said the Great Western Railway. (*To the Witness*): It is headed: "Great Western Railway. The Explosives Act, 1875" ?—Yes.

1408. Then: "By-laws made with the sanction of the Miuister of Transport by the Great Western Railway Company under and in pursuance of the Explosives Act?—Yes.

1409. Then below there is another notice: "Notice: The Company hereby give notice that they are not common carriers of explosives and do not undertake the carriage of any explosive except on special conditions signed by the sender thereof or by the persons delivering the same to the Company for carriage" ?—Yes.

1410. Then there follows: "Dangerous goods"; then in big, red letters, in order to draw particular attention to them, you set out the penalties?—Yes.

1411. Then there is a black line drawn, and the peroration of the document is this: "The Company further give notice hereby that they are not common carriers of the following articles or articles of a like uature, and that they will only carry them at owner's risk by special agreement and under special conditions." Is that right?—Yes.

1412. "Coal, coke, sand, statuary, shoddy, manure" ?—Yes.

1413. What I wanted to draw the attention of the Tribunal to, through you, was that the Company are there saying that they will only carry coal at owner's risk?—By special agreement.

1414. Yes, and under special conditions?—Yes.

1415. Because it may be necessary for me to submit that the Company, in saying that are saying something they are not entitled to; that they cannot say they will only carry at owner's risk by special agreement unless they can show there is a reasonable alternative at Company's risk. Would not you agree with me that that would be in accordance with the usual understanding of conditions of carriage. I do not want to catch you in any way?—I really do not think it is a question I should be expected to answer. It is a question of law, is it not?

1416. But as a rule, within your knowledge, is it not the custom, where there is an owner's risk rate, to have also a company's risk rate?—Generally speaking, yes. But there are quite a number of cases where there is only an owner's risk rate.

1417. Will you tell me what those are. Give me some examples of those?—They are usually very damageable articles.

Mr. Abady: Yes, things of that kind.

Mr. Jepson: There are several of them in the Classification which was recently settled.

1418. *Mr. Abady*: May we now go back to this notice. If you look at paragraph 1 you will see it says this: The Company will not be liable for any loss, damage or delay in trausit unless occasioned by the neglect or default of the Company or their servants?—Yes.

1419. May we compare that with Condition 3 of the note we are considering. "The Company shall not be liable for loss, damage, deviation, misdelivery, delay or detention of or to a consigument or any part thereof unless occasioued by the neglect or default of the Company or their servants" ?—Yes.

1420. That is a different Condition, is it not?—It is in effect the same, I think. The really important part is "loss occasioned by the neglect or default of the Company or their servants"; and that is the same in both.

1421. *Mr. Jepson*: You have introduced "deviation" and "misdelivery"?—Yes, and "detention."

1422. *Mr. Abady*: You say that you also have intimated to customers to the same effect?—I do not quite follow.

1423. You have giveu the same intimation to customers when you have beeu quoting rates?—Yes; it is printed at the head of a good many rate quotation forms, or rate lists, as issued to the public, or ou the account forms, or in some other way.

1424. Of course, you know what the important difference beiweeu us is. Perhaps you will agree with me, so that we might shorten these proceedings.

The difference is that we say it is practically impossible for a consigner of coal to prove neglect or default by the Company. Would you agree that there is very great difficulty, from your own experience?—There is a difficulty; but I think that the consignee is in a better position to prove it than the poor railway company.

1425. Than the railway company to prove that there was not?—Yes.

1426. Do you really say that as a practical matter. It is something that happens to the coal while it is on the company's premises, is it not?—I do not agree. I think in most cases it is not a thing that happens while it is on the company's premises.

1427. What do you suggest has happened?—Either defective weighing at the sending point or at the receiving point.

1428. That is to say, in a claim for loss for short weight being delivered?—Yes. In nearly every case I should say it was a difference in weights between the sending and the receiving end.

1429. Supposing that that was so; as a practical matter again, is it not very easy for the railway company to check the procedure generally at the sending end and at the receiving end with respect to weights?—No, I do not think so.

1430. Why is it not? Are you saying that you think that a loss occurs through fraudulent misrepresentation on the part of the trader, or a mistake?—I do not for a moment say it is fraudulent misrepresentation.

1431. Let us see what it is. Is it a mistake? Do you say that the wagon has got too great a weight of coal assigned to it at the beginning?—I say it is due to unavoidable discrepancies in the weighings at the two ends.

1432. Always being less at the receiving end than at the sender's end?—Oh, no.

Mr. Jepson: Mr. Pike said that where claims were made naturally they would be only made in the case of those that were less; there would be no claims made where the consignor got more, of course.

Mr. Bruce Thomas: In the one case of which he gave particulars of a claim, there was more at the receiving end than had been invoiced from the sending end.

Mr. Abady: I hope the Court will be duly impressed by that instance.

Witness: I also gave particulars of the weighings the North Eastern took of 160 wagons, and they averaged 2 cwt. more than the declared weight.

1433. Do you suggest that a claim could arise with respect to those?—Yes.

1434. In what way?—Because one wagon might be a little less, say 5 cwt. less, and another wagon might be 3 cwt. or 4 cwt. more; and that is what happened.

1435. *Mr. Locket*: It is not much satisfaction to the receiver of one wagon at a country station, which wagon is 5 cwt. short, that another man at another station has 5 cwt. over, is it?—I agree. But if one takes, as we have had to take at various times, any one consignee's traffic, and you take it over a period, although he may have some wagons that are a bit less he has others that are a bit more; and, generally speaking, there is not very much loss.

1436. *Mr. Abady*: Supposing you received a claim from a consignor under those conditions, surely you have got the means of checking his weights for a little while after the period when the claim is made to see whether his method of weighing is accurate?—I am not suggesting that his method of weighing is inaccurate in any way. He does the best he can with the materials at his disposal. But if you weigh the same truck half a dozen times you will probably get half a dozen different weights, even over the same machine.

1437. Do you think then, even if a claim is made—it seems to me to be really a frivilous claim—for a slight loss in weight, if you were in a position to prove to a Court what you are saying now would not that be a very easy matter for you to prove and to show that the loss did not arise from your negligence?—I am not sure that it would, in a County Court.

1438. That is not the only cause from which you said losses occurred. You have said they are due to the fact that coal is in a wagon which has a bottom door and side door, and coal can drop out?—Yes.

1439. When the coal drops out where does it go. Does it not drop on your property?—Yes, on to our line.

1440. Who gets possession of it unless it is put back into the truck?—If it is dropped on the line running I do not think anyone ever gets possession of it. If it is dropped in a shunting yard, or anywhere like that, it is picked up and used.

1441. *Mr. Jepson*: Do weather conditions ever affect the weight of a truck of coal?—If you get small coal and it is very wet when it is loaded, of course it weighs very much less when it is unloaded in dry weather.

1442. *Mr. Abady*: We are not discussing differences that occur through weather, or anything of that kind; although I think, Mr. Pike, allowances used to be made for varying weights due to moisture, and so on?—Yes, there used to be.

1443. *Mr. Locket*: Are there allowances made now in the case of washed coal?—No.

1444. I think there was an allowance of 5 cwt. a truck on the carriage of washed coal?—I do not think there is now any special allowance for washed coal.

1445. *Mr. Abady*: You gave some additional reasons why it would be unreasonable. One was that darkness sometimes descends and you carry on the operation of filling coal wagons in the dark. Is that peculiar to the transit of coals in the railways?—Not in the dark; but the fact that we fetch the wagons out of the colliery without any opportunity of checking their contents is somewhat peculiar to coal.

1446. Does Note "A" refer to anything of a similar nature to coal?—Some traffics, yes.

1447. A good deal is there not. All other minerals, for instance, come under Note "A," Company's Risk Note?—Yes, probably they would.

1448. A good deal of tonnage?—Yes.

1449. Is there anything which specifically distinguishes other minerals from coal in any of these difficulties that you have mentioned?—Yes, I think there is.

1450. What are they?—Coal is dealt with differently. We have not the same opportunity of checking, weighing, and so on, with coal, as we have with most other traffics.

1451. One of the things that was stated was, I think, that it was carried in open wagons without protection?—Yes.

1452. Is not that true of other minerals and of all things that are not packed?—I have said so already. I have admitted that already.

1453. You have accepted, and agreed, the liability on Note 'A" in the terms we ask you to in Condition 3 of Note "F"?—But the articles to which it refers in Class A are not anything like so valuable or so likely to be pilfered as coal.

1454. Is not ore valuable?—Not very.

1455. It is only a question of degree, is it not?—No. Coal is a very valuable article now, and people are only too pleased to get hold of a lump or two if they can.

President: It is a household commodity anyone can use at once. You cannot make much use of a bit of iron ore.

Mr. Abady: I think there must be a good many things——

President: I was only pointing that out.

Mr. Abady: Perhaps that was an unfortunate example. It may be something that would have to be sold again to be of value to the person who improperly abstracts it. But there are other materials that go open under Note "A" to which the same remark does not apply.

Witness: I cannot think of any material of any volume that passes in open trucks which is anything like so valuable as coal.

1456. Then you say that the traffic is unloaded by the traders and the company have no control over the loading or unloading?—Yes.

1457. Is not that common to all private siding traffic?—Yes, generally speaking.

1458. And general merchandise as well?—No.

1459. Is not general merchandise loaded and unloaded by the traders?—Some of it is, yes.

1460. And under circumstances in which the company has no control over the loading or the unloading?—If it is done in a private siding, yes.

1461. You say often the coal has gone away before the railway company get the consignment note?—Yes.

1462. Is not that true also of general merchandise which is sent away from private sidings? Do not you often get a note at the end of the day; did not we have that evidence before when we were discussing this question?—You are probably correct. It would be correct with private siding traffic, I agree.

1463. *Mr. Jepson*: Just to fill up the gap; in all those cases is it not the fact that the declaration is subsequently checked by the number-taker's book?—As far as the wagon goes; but, of course, you cannot thereby check the contents.

1464. No. I am speaking now as regards the number of wagons coming up from a private siding?—Yes.

1465. *Mr. Locket*: You raised some question about the discrepancies in weighing at the receiving end. Does that really arise on the conditions at all? Is it not a question of proof? Before the trader can sustain any claim for loss he must prove his loss?—Quite so. But the evidence presumably that he would give would be the invoiced weight from the colliery and the weight that was actually taken out as measured by the cart-weighing machine at the station.

1466. He would be subject to cross-examination on the method by which he arrived at his weight, and, if there is anything in that, it would be an answer to it. It does not seem to me to arise under these conditions?—Perhaps not. But it does widen the door, as it were, to claims for loss.

(After a short adjournment.)

1467: *Mr. Locket*: Before Mr. Thomas re-examines you I should like to ask you a question. You have been examined and cross-examined mainly, if not entirely, on the question of the liability or non-liability of the railway companies for loss?—Yes.

1468. You have not dealt in any way with any other part of the Condition No. 3 which is proposed by the railway companies. Do I understand that if this Condition is accepted as you propose it, it will make it impossible for the traders to sustain any claim for delay unless they can prove negligence on the part of the railway companies?—I should think that would be the effect of the Condition.

1469. Then in that case it seems to me it would knock the bottom out of the decision that was given by the Railway and Canal Commissioners in the case of *Charrington* v. *The London and North Western Railway*; you recollect that case, no doubt?—Yes, I recollect it quite well.

1470. It was then decided, I think, that the railway company were liable for any delay beyond, I think, three clear days between a certain colliery in Derbyshire and a certain depot in London?—Yes.

1471. That decision was not accepted by the railway companies without qualification?—That was not in my mind.

1472. But it still stands?—Yes.

1473. And it has been acted upon to a limited extent?—Yes, I think that is right.

1474. I do not know whether you were parties to them—I was—but there were a number of negotiations with the railway companies with a view to applying that decision generally throughout?—Yes.

1475. I think they said it must depend on the particular circumstances. We got a tentative agreement at that time that in similar cases that decision would apply, and that the railway companies would accept liability where the conditions were similar?—Yes; I think that is quite right, but it depended on the circumstances of the particular case.

1476 It seems to me if your proposal is now accepted that decision goes by the Board?—I am not sure that it does, because I should imagine that if the trader could show that the ordinary time of conveyance was a certain time and that the company had taken very much longer he would have made out a *prima facie* case and it would then be for the companies to show that there were special circumstances which rendered the longer transit reasonable.

Mr. Locket: It seems to me it is a legal point to a large extent, and I dare say Mr. Thomas would like to deal with it.

Mr. Bruce Thomas: If I may say so, I do not think it would affect it at all. All this Condition says is, limiting it to delay, that the company shall not be liable for delay unless occasioned by neglect or default of the company. Once the trader proves that the merchandise, be it coal or anything else, has been longer in transit than is ordinarily taken for the transit, that throws the onus upon the railway company of proving that there are circumstances which caused the delay which were outside their control, or, at least, were not due to any default on their part. I do not think it has any effect at all upon the decision that was given. If I remember rightly, the *Charrington* case arose under Section 6 of the Rates and Charges Order.

Mr. Locket: It really amounted to a transfer of the onus of proof.

Mr. Bruce Thomas: Quite. There is no great importance in this connection on the delay point. That claim was one for detention of wagons.

Mr. Locket: Yes.

Mr. Bruce Thomas: It is the case that decided the demurrage question. If I may deal with the point which you raised on this question I do not think, if I may respectfully say so, that it will affect the position of the railway companies at all. The trader will only have to prove delay. If a transit normally taken three days, and in the particular case complained of the transit has taken six days, that is a *prima facie* case of default, and it throws the onus of the railway company of justifying the additional three days by the special circumstances. I do not think it would be right, in any sense to say that it would knock the bottom out of the decision in *Charrington* v. *The London and North Western Railway*, or, indeed, have any effect on it at all.

Mr. Locket: I am much obliged to you, Mr. Thomas.

Re-examined by Mr. BRUCE THOMAS.

1477. There is only one matter I want to ask you a question about which arises out of my friend's cross-examination. Mr. Abady asked you about the negotiations that had taken place with the Mining Association upon these Conditions that they were notified of in 1918, and he put it to you that, generally, objection was taken by the Mining Association to this set of Conditions. Have you got the official record of the meeting that took place with the Mining Association on the 15th November, 1920?—Yes.

1478. And at that meeting were all these Conditions which are set out here discussed *seriatim*?—They were.

1479. And did the Mining Association make at that meeting their observations on each of the Conditions?—Yes, they did.

1480. The first Condition is: "The company will not be liable for any loss, damage, or delay in transit unless occasioned by the neglect or default of the company or their servants."—That is the first Condition, yes.

1481. Did the Mining Association make an observation upon that Condition?—Yes.

1482. What was that observation?—They said this: "No objection is raised to this clause. It is not considered to be outside the existing law as the railway companies do not admit that they are common carriers of coal."

1483. Although that may be correct, there are other Conditions which they did take objection to?—Yes, several.

1484. I have in mind the one with regard to the loss of market?—Yes.

1485. Although it may be correct to say that, generally, they took objection, or did not agree to this set of Conditions, in regard to the one that we are at present considering they took no objection to it?—No; that was their observation: "No objection is raised to this clause."

1486. *Mr. Locket*: Who were present at that meeting? Was there anybody besides the Mining Association—I do not mean the individuals, but were any other of Mr. Abady's clients represented there?—No, it was the Mining Association.

1487. *Mr. Bruce Thomas*: And they were pretty fully represented?—Yes.

1488. I see the Chairman was there, Mr. Evan Williams?—Mr. Evan Williams, Sir Thomas Ratcliffe-Ellis, and representatives from seven other districts.

1489. It was a pretty representative meeting so far as the Mining Association are concerned?—Yes.

Mr. Locket: What occurs to me is this, Mr. Thomas: possibly the Mining Association as colliery owners were not so directly interested in this clause as the other clients that Mr. Abady represented.

Mr. Bruce Thomas: That may be so. I only thought it right, as my friend had brought out the question of these negotiations, that I should give the real facts so far as they related to the particular Condition that we are discussing.

(*The Witness withdrew.*)

Mr. Drage: May I claim your indulgence, Sir, as this point has been mentioned? I would like to follow up what Mr. Locket has just said. The Traders' Co-ordinating Committee are every bit as much for these proposals here under P.3 as the Mining Association. Whatever may be the effect of the negotiations brought out between the Mining Association and the companes on this clause, that has nothing whatever to do with the Co-ordinating Committee's point, and we identify ourselves unreservedly with the position of the Mining Association and the argument that Mr. Abady will now address to you on that point.

Mr. Bruce Thomas: That is all I have to lay before the Court on behalf of the railway companies.

Mr. Abady: Then, Sir, on behalf of the Mining Association and the Joint Council I desire to deal with the position of my clients and put that position as plainly, and I hope I shall succeed in putting it as clearly and fairly as Mr. Bruce Thomas did on behalf of the railway companies.

The final matter that was raised by Mr. Thomas in re-examination of Mr. Pike occurs to me as being rather unfortunate, because I certainly did not consciously draw the attention of the Court to any negotiation with the idea of prejudicing the judgment of the Court in any way. I was trying, if I could, to describe through Mr. Pike the history of the negotiations, and I pointed out that the negotiations with respect to this suggested consignment note were continued and were broken off when the duty was cast upon the Railway Rates Tribunal to settle terms and conditions. My friend has been at some pains to draw the attention of the Tribunal to the fact that in company with the view that they were then taking of items other than No. 1 of these Conditions the Mining Association made a certain admission, but I think if I went through the negotiations I should also find that the railway companies made certain admissions with respect to other causes which they have since departed from. I did not state what I did about the negotiations with the idea of binding or prejudicing either party in the slightest degree. The position really is this, if you look at Condition 3: "The company shall not be liable . . . unless occasioned by the neglect or default of the company or their servets," That, I think it will be common ground, carries with it the implication that they will not be liable unless the loss is proved to have been occasioned by the neglect or default of the Company; in other words, this Condition 3, while not directly saying anything about an onus, does in fact put the onus of proof upon the person who makes a claim against the Company.

My friend dealt at some length and very instructively, if I may say so, and very fairly with the question as to whether a railway company is a common carrier. I think that if I pursued the matter and drew your attention to the cases, you would not say that it was quite such a concluded issue as Mr. Bruce Thomas said, that the railway companies are not and never have been common carriers of coal. But whether they are common carriers of coal or whether they are not, what we have to consider here is what is a reasonable condition to be imposed automatically, as it were, upon anybody who is minded to consign coal upon any of the four railway companies. I think that there is very good ground for saying that the railway companies have in fact been common carriers of coal, because they have carried for many years coal without special agreement, and I think there is legal authority for that in the case of *Dickson* v. *Great Northern Railway Company*, in the Court of Appeal in the year 1887, reported in 18 Q.B.D.

President: Is that the long case?

Mr. Abady: Yes. What Lord Justice Lopes stated at page 188 is this: "I will first consider the position and liabilities of railway companies as carriers before the passing of the Railway and Canal Traffic Act, 1854. Generally, railway companies, like other carriers, were common carriers of goods which they were bound by statute to carry."

President: That is the military and those sort of things.

Mr. Abady: Yes—"or which they professed to carry"—that is a profession—"or actually carried"—that is not a profession—"for persons generally, but not of goods which they did not profess to carry, and were not in the habit of carrying, or only carried under special circumstances or subject to express stipulations limiting their liability in respect of them." Why I am reading that passage is to draw your attention to what I submit is a correct statement of the law that the railway company could be a common carrier without any profession, if in fact they did carry the goods without imposing any special conditions.

President: Does he not allude to the question of coal in that judgment?

Mr. Abady: I think not.

President: Does he not say that they are not common carriers?

Mr. Abady: I do not think so.

President: It does not matter; it is only my recollection of it.

Mr. Abady: I did not find the passage. Perhaps I was not very anxious to find it, but I was not consciously avoiding anything.

President: It is only my recollection.

Mr. Abady: I do not know that there is very great legal authority to be attached to what I am going to put before you, but if you look at the report of the *Oxlade* v. *North Eastern Railway Company*, the No. 1 action to which Mr. Bruce Thomas has referred (also reported in the first volume of the Railway and Canal Traffic Cases at some length of time, I imagine, after the case was heard) I want to draw your attention

to a footnote to the report, which was apparently placed there in 1874, I think the date was, by the learned editors of the volume, who were Mr. Ralph Neville and Mr. Macnamara, who was the Registrar of the Railway and Canal Commission Court. They are making a comment on the decision in *Johnson* v. *The Midland Railway Company* and the *Oxlade Case*, and they say: "In *Johnson* v. *The Midland Railway Company*, decided in 1849, it was held that the 86th section of the Railway Clauses Consolidation Act is permissive only, and that a railway company who under it elect to carry goods are subject to no greater liability than attaches to carriers at common law, and therefore that such a company are not bound to carry every description of goods and between all places on their line, but only such goods and to and from such places as they have publicly professed to do, and have convenience for that purpose. The action there was for refusing to carry coals, and the judgment proceeded on the common law liability of carriers in connection with the provisions of the Railway Clauses Consolidation Act, which was incorporated with the company's special act. It will be observed that in the above case of *Oxlade* the Court do not discuss the question how far the Railway and Canal Traffic Act of 1854—passed five years after the decision in *Johnson* v. *The Midland Railway Company*—affected the question, and whether it did not impose a statutory liability upon railway companies in addition to and somewhat larger than that of a carrier at common law; that is, whether under its provisions the Court of Common Pleas could not compel railway companies to carry coal for private persons, if under the circumstances the Court thought it reasonable that they should do so? The wide words in section 2 of the Act, "all reasonable facilities for the receiving and forwarding and delivering of traffic," and the consideration that railways have practically taken the place of the highways of the country for the carriage of goods, might probably, it is submitted, have led the Court to a conclusion in this respect more opposed to monopoly than 'heir judgment in *Oxlade's Case*. It will also be noticed that the cases on which the Court relied were actions at law, which did not admit of those wider and less fettered considerations which possibly would influence a Tribunal in the decision of cases under the Railway and Canal Traffic Act, 1854, and the Regulation of Railways Act, 1873." Then they refer to the observations of Chief Justice Erle in *Bexendale* v. *The Great Western Railway Company*.

President: That particular point is dealt with, if I remember rightly, in the *Dickson Case* in Lord Lindley's judgment. Certainly one of the Lords Justices there said that they were not common carriers of goods for which they were obliged to give facilities; that is the point that gentleman raises.

Mr. Abady: Yes.

President: That is dealt with afterwards.

Mr. Abady: Yes.

Mr. Bruce Thomas: My recollection is quite right, Sir, about *Dickson's Case*. *Oxlade's Case* is referred to.

President: I thought it was.

Mr. Abady: It may be that at that time and under those circumstances the Court were quite right, and of course I cannot say, naturally, at the Bar that they were wrong in coming to the conclusion that they did come to, but it does not follow that they may not have been common carriers at some other period. The point I wanted to stress was this: whether they are common carriers or not, the matter, as I submit, for the Tribunal to decide is the reasonable condition under which coal is to be carried. I think that the duty which is imposed upon the Court by section 42 of the Act is to consider and settle terms and conditions which are the company's risk and owner's risk conditions. The short point I want to make, and I think it is really the principle point, is that suppose you put the onus upon the trader of proving negligence or default of the company, that is such a difficult onus to discharge that in effect you are depriving him of any opportunity to get redress for a genuine grievance with respect to loss, damage, deviation, mis-delivery, delay or detention, and that you are therefore, making him an insurer of his traffic and entirely relieving the railway company of all responsibility to such an extent and to as great an extent as it were possible to relieve the railway company under the owner's risk conditions. I hope I have made that clear. Under owner's risk conditions, as far as I know, a contract made in accordance with section 7 of the Act of 1854 may relieve the railway companies of responsibility for negligence and default. Then a contract may be entered into which must be signed and must be reasonable. You have all these points in your mind, I have no doubt, but one of the tests of reasonableness is that there is a fair alternative at a higher rate offered to the trader. If it can be shown, and I think it is manifest that under those conditions a trader really is not in a position to prove negligence or default on the part of the railway company, are you not depriving him of a condition of carriage under company's risk conditions?

President: I am not quite certain whether what you say about the alternative is correct. When the railway company seek to absolve themselves from the consequences even of their own neglect, as in the fish cases and the horse cases, then they must show a reasonable alternative.

Mr. Abady: Yes.

President: It is suggested that they should, but here they are to be liable.

Mr. Abady: Yes, they are to be liable on paper, but it is subject to proof really by the trader that they have been negligent.

President: That is right, but you know that the onus of proof is always shifting in a trial. The plaintiff begins and shows a *primâ facie* case, and the onus then shifts to the defendants.

Mr. Abady: I quite agree. Although it is inappropriate on a discussion of this nature that there should be any conflict, in fact the mining industry has always persisted in refusing to accept the railway companies' conditions, and it is equally true to say that when claims have been put forward the railway companies have been equally consistent and have said: "We will not recognise a claim unless you can prove negligence," and for some reason or other it apparently has never been worth the while of anybody in the mining industry to put the relative positions of themselves and the railway companies to the test. I admit that perfectly, and I think the reason why there have been few claims is on account of the attitude which the railway companies have taken, and on account of the fact that owing to the general relationship between collieries and coal factors and the railway companies it has never been worth anybody's while to test it.

President: You are sending after notice brought home to you, as I understand, and that is still available to the railway companies, apparently, looking at *Shaw*.

Mr. Abady: Yes, I quite admit that.

President: So far as the law is concerned, there was not much question about it.

Mr. Abady: I do not know. I do not think it really helps anybody to discuss it at great length, but supposing they did have notice brought home to them and then they gave notice to the railway company, "We will not accept that, and we are not sending coal under those conditions," it may be a question as to whether they are bound by those conditions.

President: Do you think it is?

Mr. Abady: I think so, Sir, with respect. I hope I have put the contention quite plainly. I quite admit that that is the position to-day. The railway companies raised that contention and the traders simply let the thing go by default, but now we come to another stage when new conditions, which must be reasonable and must be company's risk conditions under the Railways Act, have to be settled, and I

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am submitting to you that the practical effect of Condition 3 with the onus as it is, is really to deprive a trader of any redress if he suffers any loss. It is really not a question of law. If I may say so, I do not see that there is any call for the Court to be troubled in any way by what may have been the law in the past. If you are settling the Condition which is to apply automatically, the real test is what is just and reasonable. On justness and reasonableness I quite admit that there is a good deal to be said on both sides. I admit a great deal of what Mr. Pike says as to the conditions under which coal is sent. I admit that coal is sent in very large quantities; I admit it is sent in open trucks, and if the railway companies had the onus to discharge that they were not negligent, it may be difficult for them to discharge that onus. But, on the other hand, you have as a fact huge quantities of merchandise of this particular character passing over the lines and in the custody of the railway company, and if it might be in some cases difficult or perhaps an injustice to a railway company to have to prove that they were not guilty of negligence in a particular case, on the other hand, is it not an unreasonable position to place a large industry in that these huge quantities of merchandise are to be placed on the railways in the railway company's hands under conditions which the railway companies know very well, which they are accustomed to, and the difficulties attending which I suggest they ought to guard against? Is it not difficult, is it not unreasonable that traders should be practically without redress if you agree that the onus being upon the trader puts him in a position of being without redress? That I put to you most seriously is a matter which is really worthy of serious consideration, because it is a very difficult matter indeed for a trader to prove that there was here negligence. The loss or damage or deviation, or whatever may be the cause of complaint, has occurred while the property is in the hands of the company and not in the hands of the trader, and the company ought to be in a better position to know what has happened to the traffic than the person who is making the claim. I suggest that it is only in such a manifest case where one should say *res ipsa loquitur* that you could put the onus upon the railway companies. I thought that was the position in the *Charrington* action. That was a question, as Mr. Thomas pointed out, of demurrage; that is the real practical point. I know there is a difficulty on both sides, and I am putting before you, and I hope I put it fairly without any evasion at all, what the position of the two parties has been during all these years. You may think that the position of the parties has been such that it is given expression to in Condition 3, and you may think that it is reasonable that that should be continued. I am pointing out to you the difficulty that the traders have been under, and the reason why claims have been as few as they have been, and I ask, having regard to the duty which the Court is going to discharge under Section 42, whether making a Condition which applies to company's risk rate for the carriage of coal, such as Condition 3, is in fact putting the trader in a reasonable and just position? I do not want the Court to be under any misapprehension as to what I am trying to say about Section 7. I know the one is that you must prove wilful misconduct, and I know the other is that you have to prove neglect; but if it is almost impossible to prove neglect or default you might just as well replace the words "neglect or default" by the word "misconduct." It is equally difficult and impossible to prove it, and that has been found over and over again. That I think is the contention that I desire to put, and, as I have put it plainly, I do not think I need repeat myself.

Now, Sir, as regards the course which these negotiations have taken I think I ought to draw your attention to this fact—it does not help me very much, but I think I am doing my duty to the Court in telling them: if you look at the first Condition proposed by the railway company it is this: "The company shall not be liable for any loss, damage, or delay in transit unless occasioned by the neglect or default of the company or their servants." That, I think, is exactly repeating the Condition that was in the note that Mr. Thomas has referred to. It is not quite the same as Condition 3. What the Mining Association did on that was to object to it, and asked that the onus should be shifted. They have been consistent in that respect. Now, having seen how the onus has been shifted and how that has been given expression to in the corresponding Condition with respect to general merchandise at company's risk, the Mining Association ask that that same Condition, this being a company's risk note, may be applied to them. I just wanted to point out the intermediate step of putting forward by the railway company of a Condition not substantially the same as Condition 3, and the objection of the Mining Association, which was substantially in the form that it now takes, with this exception, that I do not think it follows because the company have the onus of proof that the loss was not due to the neglect or default of the company necessarily makes them insurers. I think there is a distinction between the two things. If they can show that the damage arose without negligence or the loss arose without negligence of their servants, that is not putting them in the position of being insurers, because I think if they were insurers it would not be relevant whether they were negligent or not negligent. I wanted to draw that distinction. Even in the Condition as suggested, owing to the previous, it is not asked that the railway companies should be insurers. I wanted again, if I may, to contrast that with what I submit will be the position of the consignor if the Condition is passed in its present form, and I suggest that the practical effect, owing to the difficulty of proving negligence or default, is to make the trader insurer of his traffic, and if he is insurer of his traffic, then the traffic is being carried at owner's risk in effect, and there is no company's risk condition attached to coal as required by the Act of Parliament.

I do not propose to call any evidence. I have not taken very long, but I hope I have put the contention clearly to you on behalf of the clients whom I represent. They both take the same view, and I must leave the matter for the decision of the Court. I ought to say, of course, that your decision on this Condition will affect other Conditions which we have to consider later on. I almost take the view that if the onus is put upon the trader as suggested, the rest of the note is of very little importance, if I am right in my premise that the onus is such a difficult one that it is impossible to discharge it, and the railway company therefore is not under any liability.

Mr. Bruce Thomas: I think you are unduly apprehensive.

President: Do you wish to reply, Mr. Thomas?

Mr. Bruce Thomas: I do not know that I have strictly any right to say anything further.

Mr. Abady: I have no objection.

President: I think you may reply on any legal point.

Mr. Bruce Thomas: My friend referred to *Dickson's Case* and the *Oxlade Case*. I observe in *Dickson's Case*, referring to the *Oxlade Case*, Lord Justice Lindley says: "So railway companies are bound to provide reasonable facilities for carrying animals or particular classes of goods, but it by no means follows that they are liable as common carriers for what they are bound by statute to carry. This distinction is important and requires to be borne in mind. Whether railway companies are common carriers of particular classes of goods depends upon what they habitually do or profess to do with respect to such goods. The Railway and Canal Traffic Act, 1854, does not make railway companies liable as common carriers in respect of goods which they do not profess to carry as such. This was, in fact, decided in *Oxlade* v. *North Eastern Railway Company*." It was in *Oxlade's Case* where the Court of Common Pleas came to the conclusion that the North Eastern Company were not common carriers of coal.

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The note that my friend referred to by the editors of the first volume of the Railway and Canal Traffic Cases really goes to this point. It appears at the top of page 97 that the editor is suggesting whether under the provisions of the Railway and Canal Traffic Act, 1854, the Court of Common Pleas could not compel railway companies to carry coal for private owners if under the circumstances the Court thought it reasonable that they should do so. I do not think anybody would contend for a moment to-day that the Railway and Canal Commission could not compel a railway company to carry coal for particular persons if they thought the railway company should do so; that is an ordinary question of facilities. I do not see that the note has any bearing upon the matter which we are discussing to-day.

The only observation that I have generally to put upon the whole case is this: I think, as my friend very fairly stated, the position of the parties is given expression to in Condition 3 as proposed by the railway companies, and he says the real question is: Is it a just and reasonable Condition to make? We know that that has been the position as between the parties for all the years that have gone by since railways were first constructed and since railways have carried coal, and it is a most remarkable thing that no case of hardship has been brought to the attention of the Court, and I do not know that any case of hardship has ever been suggested. Therefore I submit that no reasonable grounds have been suggested to the Court as to why an alteration should be made in the state of affairs that has existed apparently without any hardship for all these years. I submit that the railway companies' proposal is eminently fair and reasonable.

I should just like to mention one observation with reference to the negotiations which took place between the Mining Association and the railway companies. I do not suggest for a moment that that expression of opinion has any force at all in this Court. I merely thought it right to draw attention to it, because my friend had stated in terms that the Mining Association during those negotiations had—I took his exact words down—taken objection generally to the note put forward by the railway companies, and as we were discussing only one Condition I thought I was entitled and I did not think it at all improper to draw the Court's attention, the matter having been raised by my friend in cross-examination, to the fact that no objection had been taken to this particular point.

Mr. Abady: I forgot to make one submission, Sir; perhaps I may make it now, subject to Mr. Thomas having the right to reply. I simply wanted to point out that if this Condition is passed as proposed by the railway companies, there will be this anomaly, that the onus will be one way in connection with the carriage of coal and it will be the other way in connection with the carriage of minerals and other similar classes of traffic carried under Note A.

Mr. Bruce Thomas: Quite so; they will be insurers practically under Note A; that is all.

(*The Tribunal conferred.*)

Decision on Condition 3.

President: The Court have come to a unanimous decision upon this point, although I ought to say that it being in their opinion largely a legal point my colleagues have, to a certain extent, deferred to the opinion of their President on certain points where they otherwise would have liked to express themselves perhaps in a slightly different sense; but they look upon it so largely as a legal question that they think it is right that the onus, so to speak, of the decision, and the reasons for the decision should largely rest upon myself.

The view that I take of the matter—and my colleagues must not be supposed as dissenting from that view, but they have deferred to some of my opinions as to the law—is as follows. This matter comes to us with rather a long history behind it, and it rests upon a very well-known principle that a carrier can limit his risk by giving sufficient notice, or limit it by making a profession of what he will carry. It seems to be beyond question that, ever since coal has been carried by rail, the railway companies have not carried it as common carriers; there seems to be no question about that. All that learning and industry can do has been done; all the books have been consulted; all the decisions on the question have been brought to our notice; and they completely confirm this proposition. That is the state of facts which has existed down to the present time. Although we have heard a good deal on one side and the other of the inconvenience of this or the convenience of it, there is no evidence that the system has not, as a whole, worked well. That there should occasionally be friction between the two parties, and that there may be, is very likely. Possibly some trader may find his coal short and in that case would desire an easy remedy without having the onus of proof placed upon him, but the company not carrying as common carriers, he does not think it worth while to do more than attempt by negotiation with the company to obtain satisfaction. But even then it is a striking fact that there has been no evidence presented to us on behalf of those who are objecting to the railway companies' proposals that there is any serious loss suffered by anyone under the present system as worked, and that weighs with us a good deal. The duty of dealing with the legal question is upon me, but my colleagues are at one with me. They think it is a striking fact that, although the system is complained of and is sought to be altered, there is no evidence at all that it has worked badly.

Under those circumstances we do not feel disposed to revolutionise a system which has been in existence ever since the railways were first constructed, and which is not proved here to have worked harshly, and to adopt some other system. What we decide is that under the circumstances the Condition as presented by the railway companies will stand, but it is not absolutely the law of the Medes and Persians. If at any future time a case can be made which the objectors do not appear to have now, that this Condition as framed by us is causing great loss and damage to the coal industry, we might possibly reconsider it. I do not want to encourage the idea, but if on any future occasion objectors are able to bring an overwhelming case showing that the operation of the Condition is causing great loss, I think I may safely say for my colleagues, Mr. Locket and Mr. Jepson, that we should feel ourselves called upon to reconsider it.

Condition No. 4.

Mr. Bruce Thomas: The next Condition, Sir, on which any question arises is Condition No. 4.

Mr. Abady: On No. 4 the only point is this, and perhaps it would be convenient if I dealt with it, because it might shorten matters. It says: "In the case of fuel consigned to a destination which entails transfer to an independent carrier, which expression shall not include a railway company of Great Britain, the company shall not be liable for loss, damage, deviation, misdelivery, delay, or detention except upon proof that the same arose on the system of a railway company of Great Britain and that the company are liable therefor under these conditions." In view of your decision on Condition 3—of which please do not think, if I refer to it, I am in the slightest degree complaining; it would not be respectful of me to make any comment, and I do not wish to do so—you will see that the trader would have to prove neglect or default, and also would have to prove that the same arose on the system of a railway company in Great Britain; and a suggestion has been made in a very much longer clause, none of which appears to me to be of very material importance except (*d*). Would you kindly look at (*d*)? We accept the position in (*c*), where the place of destination is outside Great Britain, that the trader must prove that the same arose on a system of a railway company of Great Britain; but where the place of destination is within Great

Britain the company shall not be liable on proof by them that the same did not arise on the system of a railway company of Great Britain. That is really turning the onus again in respect of proof as to whether the damage arose on the system or whether it did not. It is, therefore, a matter for you to decide; and it seems to me that the factors are very similar to those which you had to take into consideration when you considered Condition 3.

President: Is this Condition really opposed by Mr. Bruce Thomas?

Mr. Bruce Thomas: I have not said anything about it yet, Sir. I was starting when my friend interposed and said he thought he could shorten matters.

President: Would you mind letting us hear what Mr. Bruce Thomas has to say, Mr. Abady? You see, of course, you are full of it, so to speak; I have to take it more slowly. Do you mind?

Mr. Abady: Not at all, Sir.

President: I want to understand what it is.

Mr. Bruce Thomas: This Condition deals with the transfer of coal to an independent carrier. As proposed by the railway companies it provides: "In the case of fuel consigned to a destination which entails transfer to an independent carrier, which expression shall not include a railway company of Great Britain, the company shall not be liable for loss, damage, deviation, misdelivery, delay, or contamination except upon proof that the same arose on the system of a railway company of Great Britain and that the company are liable therefor under these Conditions." The first thing that the trader would have to show in such a case as that would be that the railway company which he was suing had lost the coal; it would not be sufficient for him to show that a truck containing eight tons was handed to the railway company, and that when that truck arrived at its ultimate destination, having passed through the hands of some carrier who was not a railway company of Great Britain, when it arrived there it was two tons short—that would not be sufficient for him to start his case. He has got to show that when the railway company handed over the truck to the independent carrier it was two tons short. I am taking that example. Now, when he had done that he would still have not got his case going, because the railway company are only liable for loss on proof that the loss was caused through their neglect, and he must ultimately get back to that point, because he has got to show that the loss of which he is complaining was suffered through the neglect of the railway company, and therefore it is essential that he should prove that the loss occurred on that railway. The coal could not be lost through the fault of the railway company unless it occurred on their railway. If you look at this Condition in that light the onus of proof of negligence which is upon them really sweeps up this objection that is put by my friend that they ought not to have the onus of proving that the loss occurred on the railway. There is no distinction between the two things; they are both swept up by the first obligation that is put upon him.

You will observe this, Sir—my friend drew attention to it—that in (c) they agree that when the place of destination is outside Great Britain the company are not to be liable for loss unless the trade proves that that loss took place on a railway of Great Britain. Of course, if anything in that form were approved by the Court there would have to be added the words "and the company are liable therefor under these Conditions." I merely draw attention to that in order to show that in another aspect of the same matter—that is, when the traffic is going to a destination outside Great Britain—they agree that they ought to have to show that the loss actually took place on a railway of Great Britain.

President: What are you going to say about this which is in italics?

Mr. Bruce Thomas: Shall I run through that, Sir?

President: I wish you would.

Mr. Bruce Thomas: What you have in italics there is, I think, nothing more than a copy of the seventh Condition which is settled in consignment note "A." It is entirely inapplicable to coal.

Mr. Abady: You have put some words in there which we did not submit. There is a mistake there.

Mr. Bruce Thomas: Where?

Mr. Abady: "Or a contractor."

Mr. Bruce Thomas: If I might just run through the Condition which is in italics——

President: You must not consider that we know too much. You must just make it perfectly plain where you differ from your colleague, and the reason why.

Mr. Bruce Thomas: If you please, Sir. You will note that our Condition is fairly short, and it is to this effect: when coal is consigned to a destination off a railway company of Great Britain, and has therefore to be transferred to some carrier who is not a railway company of Great Britain, we are not to be liable unless the trader proves that the loss occurred on a railway of Great Britain.

Mr. Jepson: Would a case in point be coal consigned to a dock which is privately owned? Would that be an illustration of the case which this section is designed to meet?

Mr. Bruce Thomas: Yes, I am told that is so.

Mr. Jepson: It is where traffic is carried at a through rate, but it has to pass over a line of railway to a dock or on a private estate or something like that—carried at a through rate, where the line of railway——

Mr. Bruce Thomas: It would not necessarily be at a through rate, Mr. Pike reminds me, because it is in the case of fuel consigned to a destination which entails transfer.

Mr. Jepson: So it would be even locally booked?

Mr. Bruce Thomas: Yes, two local rates; or, rather, a railway rate and someone else's rate. And all we would have to do under our contract would be to deliver it on to the premises of the succeeding carrier. Now in the ordinary case, and it is what we suggest here, in order that a claim should be made against us it shall be necessary that the trader shall prove that we have not delivered what he handed to us. How will he do that, it may be asked? He complains to the dock company, or to whoever is the ultimate carrier, that there has been a short delivery, and the dock company say: "We have delivered all we have received from the railway company." Then the trader says: "Very well; satisfy me as to that, and then I can prove that this coal must have been lost on the railway company's railway." That is how it would work out in practice. Then, having proved that, he has to prove that it was lost through our neglect. That is our proposal.

If I may now turn to the proposal shown in italics, I want to show how entirely inapplicable it is to coal traffic as carried in this country. It says: "In the case of fuel consigned to a destination which entails transfer to an independent carrier, which expression shall not include a railway company of Great Britain," now they add "or a contractor employed by the railway company to deliver fuel within the usual delivering area of a terminal station." I think the Court knows that that is not done; and it is perfectly ridiculous, I suggest, to go and take those words and put them into their proposal merely because they happen to be in the General Merchandise Note.

Mr. Abady: I have already explained that it is quite an error that those words are in. It was never intended that they should be.

Mr. Bruce Thomas: Then, of course, they go out. Then it will read: "In the case of fuel consigned to a destination which entails transfer to an independent carrier, (*a*) the company's obligations and liability notwithstanding that the fuel may be addressed through to destination, or may be carried at a through rate, shall only relate or extend to those portions of the journey performed on the system of a railway company of Great Britain"; then the succeeding words come out down to the word "station." Then it proceeds: "The transit by

such company shall (unless otherwise determined) be deemed to terminate—where the journey is to be completed by any independent carrier, when the fuel is tendered or transferred to any such carrier." That never happens. If necessary I will call Mr. Pike to give evidence as to that. (*Mr. Bruce Thomas consulted with his Clients.*) If I may go back to the word "station," Sir. "The transit by such company shall (unless otherwise determined) be deemed to terminate—where the journey is to be completed by any independent carrier, when the fuel is tendered or transferred to any such carrier"—I said that never happened; I was wrong in making that statement.

President: My colleagues thought you were.

Mr. Bruce Thomas: But that means no more than we have said in our Condition. It is the same thing, and it is quite unnecessary. Then it goes on: "or shall be deemed to be suspended—where the fuel is to be carried by any independent carrier for an intermediate portion only of the journey when the fuel is tendered to and not accepted by such carrier, or, if so accepted whilst it is in the possession of such carrier." That, I am told, never happens. To take an illustration: coal going to the Isle of Wight. It is there consigned to Portsmouth or to Southampton; it is taken by the packet or steamship company over to the Isle of Wight, and another contract made. That is all provided for under Condition 4. It is only consigned to a port, it is said.

Mr. Jepson: That is the reason why I raised the point whether it was a through rate. This might not be a through rate, but it might be consigned through.

Mr. Bruce Thomas: This coal is not even consigned through; it is consigned either to Southampton, or to Portsmouth, or wherever it goes.

Mr. Jepson: So the Isle of Wight case would not come in under your proposed clause; and there is no other case in the country where coal traffic in the course of its consignment journey would be handed to an independent carrier and then taken back from the independent carrier by a railway company?

Mr. Bruce Thomas: No; there is no case of that kind. The other instance of coal which goes first by land and then by sea, and then finishes by land, is, I believe, coal from South Wales; that goes to one of the South Wales ports; then across the Bristol Channel, and then goes by train again. That, again, is not consigned to the ultimate destination; it is consigned to the port. Therefore we say those words are quite unnecessary, and have no relation to the practice to-day.

Then (*b*): "The company and any succeeding carrier are authorised as agents for the sender or owner to contract for the further carriage upon the terms of any Bill of Lading or other Conditions usually required by any succeeding carrier." That, again, follows from what I have already said; that never happens.

Then (*c*): "When the place of destination is outside Great Britain, the company shall not be liable for loss, damage, deviation, misdelivery, delay, or detention except upon proof that the same arose on the system of a railway company of Great Britain."

There is the point that my friend was putting. But that never happens. Fuel is never consigned on the railway to a destination outside Great Britain; it is really consigned to the port on this side. There you see that they accept the position that they have got to prove that the railway company short delivered to the dock company. It has to be delivered to the dock company, or to a shipper, or whoever it may be. That is all we are asking for in our Condition 4. Then they say in (*d*): "When the place of destination is within Great Britain the Company shall not be liable for loss, damage, deviation, misdelivery, delay, or detention upon proof by them that the same did not arise on the system of a railway company of Great Britain." What we say upon that is this, that where fuel is consigned to some destination which involves transfer to an independent carrier, it may be a dock company or someone with a private line, the conditions of transfer render it impossible for the railway companies to check whether there is any loss at the time it is handed to the independent carrier.

You see, if there is a trainload of coal and it is going to some dock, say to Preston Dock, which I believe belongs to the Preston Corporation, what we say is, if we deliver the trainload of coal on to the dock premises it is not for us to show that we have delivered all that you handed to us because it is not possible for us to prove that; but you must get the dock company to prove that they have actually received less than was consigned. If they have received less than was consigned that will enable the trader to prove that the loss occurred on the railway, and it is possible for the dock company who actually deal with the coal to prove that they have not received what has been declared.

One other observation. It seems to us that the proposal which the Mining Association make of putting the onus upon the railway company is inconsistent with Condition 3 which has just been settled by the Court. You have to prove the neglect of the railway company, and it seems to me a somewhat curious thing, that being the decision of the Court, to put upon the railway companies the onus of proving first of all that it was not they who lost the coal. I submit that there is no ground for disallowing the fourth Condition that is proposed.

Mr. Locket: Mr. Abady, do you attach any importance to this, in view of the decision on Condition 3?

Mr. Abady: It raises really another question. Take the case that Mr. Thomas put at the end of his submission to you—the transier to an independent carrier, a private railway line I think he said. He told us that the difficulty was that the railway company were not in a position to prove what weight of fuel they handed over to the independent carrier. That is exactly what we suggest they ought to have proved; and it has nothing whatever to do with the liability which may attach to them if the weight they hand over is less than the weight that they received. Supposing they received 15 tons and handed over 13 tons; that would be proof that the loss did occur while the coal was on the system of the railway company. But when we have to prove that they were liable for the loss of those two tons, we have to prove under Condition 3 that that loss arises owing to their negligence. It is difficult for me to see where the distinction comes between the responsibility on the Company of proving the weight of what they do deliver to the consignee at the absolute end of the journey, or what they deliver during the journey to an independent carrier or to a private railway upon which the fuel may be transferred during the course of its transit.

Mr. Jepson: It seems to me that the position is just the same, with one exception. Take the case of Preston, which Mr. Bruce Thomas mentioned. One knows from experience that not only is the Preston Dock at the end, but there are works on that line, and that that line—I have walked along it many a time—is open to anyone going down to the docks. It might be that the railway company may deliver from one of the Lancashire collieries the trucks intact on to the Preston Corporation line; the trucks may remain there one or two days before they get to the dock or into the works; when they get into the works it is found that there is a shortage, and a claim is made. The railway company—in this case the London, Midland and Scottish —would say, "Well, but we handed the trucks to the Preston Corporation as we received them from the colliery."

Mr. Abady: I understand Mr. Bruce Thomas to say they are not in a position to do that, and that is exactly what we want them to do.

Mr. Jepson: Then the railway company would say, "We do not know what happened to these wagons after they were passed over the junction and on to the Corporation property, and before they got to the works on the Corporation property or got

to the Preston Dock." If your people could find out from someone that while they were in the hands of the Preston Corporation they were not interfered with in any until they got to the docks or to the works on the Corporation property, then the assumption is that any loss that has come about occurred before they were handed over to the Preston Corporation.

Mr. Abady: Yes, quite so. In other words, if I may say so with great respect, are not you suggesting that there should be an inferential proof as to whether the loss occurred on the system of the railway instead of the direct proof to which we are asking the railway companies to submit, which is simply to give an account of what fuel they did hand over at the end of their responsibility for their portion of the journey? It seems to me to be a self-evident proposition.

Mr. Jepson: I am not sure, taking the case in point, that the London, Midland and Scottish Company would have any right to go down to the works on the Corporation estate to find out what was the weight which was handed over to the Preston Corporation.

Mr. Abady: But they could prove what weight they hand over to whoever takes the coal to the works.

Mr. Jepson: I do not know. It is a matter of difficulty.

Mr. Abady: If they were delivering coal to a consignee they might have to prove what weight they carried over; apart from their responsibility, if there is a loss, which is quite another thing.

Mr. Jepson: That is carried at a through rate, and this traffic would be consigned through; but before it got to its destination for which the money has been paid to the London, Midland & Scottish Company they would have parted with it, and they cannot follow it up.

Mr. Abady: Because they say they do not want to take the responsibility of saying what the weight was when the parted with it.

Mr. Locket: Are there many cases in the kingdom where those conditions prevail?

Mr. Abady: I do not think there are a great many.

Mr. Locket: The volume of traffic would not be large.

Mr. Abady: No, I do not think it would be very large; but it might be important to those who partake in that traffic, who are interested in it, nevertheless. I may remind you, Sir, that this was put in Condition A, and if I am submitting this it has nothing whatever to do with the onus of proof as to the cause to which the loss is due.

Mr. Locket: It was put in Condition A, but that is not applicable to the coal and coke trade. I was reading it over yesterday, and I could not understand why the Mining Association put this in.

Mr. Abady: It may have been the addition, or the appearance in the clause, of those words: "which expression shall not include a contractor employed by the railway company." It was quite a misunderstanding that those words were in, and they were never intended to be in. As a matter of fact, in the draft submitted they were taken out in paragraphs (*a*) and (*c*) by the Mining Association, but had been left in in the first paragraph in the case of fuel; and the railway people, in quite a *bona fide* way, assumed they ought to have been in in the other paragraphs; as a matter of fact, they ought to have been out of them.

Mr. Jepson: Can you tell us whether, in a particular case before your mind, there has been a hardship on either the colliery owner or the consignee?

Mr. Abady: No, I have no special instructions; but Mr. Clench is here, and he no doubt could on several of these matters give the Court information.

Mr. Jepson: Will you ask him if he has a case which is a glaring case of hardship?

Mr. Abady: I have consulted Mr. Clench, and the answer is in the negative.

Decision on Condition 4.

President: Condition 4, as drafted by the railway companies, stands.

(*Adjourned till to-morrow at* 10.30 *a.m.*)

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